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00-3134

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent-~~Respondent~~

-vs-

JOHN TOMLINSON, JR..

Defendant-Appellant-Petitioner

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Case No. 00-3134-CR

Milwaukee County, Judge Jeffrey A. Wagner

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vs.

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ISSUES PRESENTED

1. CAN A MINOR AUTHORIZE A POLICE ENTRY INTO A HOME RESULTING IN THE POLICE EFFECTUATING A WARRANTLESS ARREST IN THE HOME AND, IF SO, WHAT PROOF MUST THE STATE ADDUCE AT A SUPPRESSION HEARING TO ESTABLISH THAT THE ENTRY INTO THE HOME WAS PROPERLY AUTHORIZED, AND THAT THE MINOR, IN FACT, CONSENTED TO ENTRY?

2. WAS OTIS COLEMAN PROPERLY FOUND TO BE AN UNAVAILABLE WITNESS?

3. WHAT IS THE EXTENT OF THE COLLOQUY REQUIRED TO ESTABLISH A KNOWING AND VOLUNTARY WAIVER WHEN A DEFENDANT AGREES TO A JURY INSTRUCTION THE RESULT OF WHICH IS A DIRECTED VERDICT ON THE ISSUE OF WHETHER AN INSTRUMENTALITY USED IN AN OFFENSE WAS A "DANGEROUS WEAPON"?

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

This case is approprpriate for oral argument and publication as argument would permit clarification of the

positions taken by the parties and publication will advance the status of the law governing search and seizure, confrontation of witnesses, and waiver of elements of an offense.

STATEMENT OF THE CASE

In a one-count information the defendant was charged with first degree reckless homicide while using a dangerous weapon, party to a crime. The defendant was convicted after a jury trial held in Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner presiding. The defendant was sentenced to a total of 38 years in the Wisconsin State prison system.

The victim in this case was Mr. Louis Phillips, who died as the result of blunt force trauma to the head. The charge stemmed from an alleged altercation that occurred on February 6, 1999 at which time it was alleged that the defendant struck the victim, Mr. Phillips, several times with a baseball bat. Mr. Phillips was injured on February 6, 1999; however he died on February 11, 1999.

Evidence introduced at trial included a baseball bat seized from the defendant's home at the time of his arrest. The admission of that bat into evidence was the subject of a suppression hearing.

Other key evidence against the defendant consisted of preliminary hearing testimony of Mr. Otis Coleman, who did

not testify at trial. Over objection, the State was allowed to read the preliminary hearing testimony of Mr. Coleman after he, at trial, invoked his 5th Amendment right not to testify.

At the close of trial a jury instruction was given regarding the definition of a dangerous weapon. The jury was instructed that the bat seized in this case constituted a dangerous weapon. That instruction was not objected to by the defense. The State however questioned the instruction indicating that it felt the instruction was relieving the State of its burden of proving that the bat, as used, constituted a dangerous weapon. The State indicated that it felt that was a jury issue. With the acquiescence of the defense the instruction stood as drafted by the court.

Issues regarding the propriety of the seizure of the bat from the defendant's home, the admissibility of the preliminary hearing testimony, and the giving of the, in essence, directed verdict with respect to the bat being a dangerous weapon, were subjects of a postconviction motion, which motion was summarily denied by the trial court without a hearing.

An appeal was taken to the Court of Appeals of both the denial of the postconviction motion and the judgment of conviction. The Court of Appeals affirmed the trial court in an opinion recommended for publication.

STATEMENT OF FACTS

According to her trial testimony, Ms Angela Green was walking up Chambers Street on February 6, 1999 when she observed three people. She stated one was a man, carrying a bat, and the other two were girls, carrying sticks or mop handles (R. 45:8). She identified the defendant as the man she saw carrying the baseball bat (R. 45:15, 17). After seeing these individuals she testified that she came upon a man laying on the sidewalk. She asked a Mr. Mickey Haynes to call 9-1-1 (R. 45:18).

Mr. Haynes did call for help and paramedics and police responded to the scene. The man lying on the street, Mr. Louis Phillips, ultimately died from his injuries. Dr. Butch Huston testified at trial that the victim died from cranial injuries and the victim's injuries were caused by blunt force trauma (R. 44:59). He testified that the blunt force trauma could have been caused by an object like a baseball bat (R. 44:62). Although Mr. Phillips was injured on February 6, 1999, he died on February 11th.

According to the trial testimony of Detective Dennis Kuchenreuther, at least three weeks after the victim sustained his injuries, the detective spoke with Angela Green. Ms. Green gave the detective the defendant's address. Subsequently, Detective Kuchenreuther went to the defendant's house, arrested the defendant, and seized certain items,

including a baseball bat (R. 47:79).

At trial the baseball bat was admitted into evidence. (Exhibit 9).

At trial, the only direct evidence identifying Mr. Tomlinson as the person who struck Mr. Phillips was the preliminary hearing testimony of Mr. Otis Coleman, which testimony was read into evidence over the objection of the defendant.

During the trial Mr. Otis Coleman was called to the stand by the State. When called to the stand Mr. Coleman refused to testify. Mr. Coleman had previously testified at the preliminary hearing. When called at trial he was in custody on a probation hold, as he had been at the time of the preliminary hearing. At trial he was asked whether he was willing to answer questions regarding his knowledge of the death of the victim. He invoked his fifth amendment rights. Based on his refusal the State moved to admit Coleman's testimony from the preliminary hearing. Over defense counsel's objection, that preliminary hearing testimony was admitted. In essence Mr. Coleman's testimony was that he observed the defendant, Mr. Tomlinson, strike the victim with a baseball bat (R. 38:17,18,19).

Such additional facts as may be relevant will be set forth, with cites to the trial court record, in the pertinent argument sections below.

ARGUMENT

I. AT THE SUPPRESSION HEARING THE STATE DID NOT PROVE THAT THE MINOR WHO ANSWERED THE DOOR AT THE TIME OF THE DEFENDANT'S ARREST IN HIS HOME HAD AUTHORITY TO CONSENT TO ENTRY OR, IN FACT, CONSENTED TO ENTRY BY THE POLICE. THEREFORE THE BASEBALL BAT SEIZED FROM THE DEFENDANT'S HOME WAS IMPERMISSIBLY SEIZED AS THE RESULT OF AN IMPROPER ARREST WITHOUT A WARRANT IN THE HOME.

A. THE APPLICABLE GENERAL PRINCIPLES OF LAW AND THE STANDARD OF REVIEW.

The Federal Constitution and the Wisconsin Constitution both guarantee that citizens shall be free from unreasonable searches and seizures and that no warrant shall issue except upon probable cause. Amendment IV - **U.S. Constitution**; Article I - Section 11 - **Wisconsin Constitution**. For reasons of clarity and consistency, the law of search and seizure under the state constitution is construed in conformity with decisions by the United States Supreme Court under the Fourth Amendment. E.g., State v. Fry, 131 Wis. 2d 153, 172-174, 388 N.W. 2d 565 (1986). The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984).

The law governing warrantless arrests in a person's home is set forth in Payton v. New York, 445 U.S. 573, 576, 590

(198) and Laasch v. State, 84 Wis. 2d 587, 596, 267 N.W. 2d 276 (1978). The police can make a valid warrantless arrest in a person's home if the police possess probable cause and exigent circumstances exist to justify entry into the home, or they have consent to enter the home. See State v. Rodgers, 119 Wis. 2d 102, 107, 349 N.W. 2d 453 (1984).

Consent to an entry is not to be lightly inferred, but must be shown by clear and convincing evidence. The burden is on the State to show a free, intelligent, unequivocable and specific waiver. See Rodgers at 102, 107 (citations omitted).

On appeal, a reviewing court will defer to a trial court's findings of historical fact unless they are clearly erroneous, but the ultimate determination of reasonableness under the Fourth Amendment must be reviewed de novo. Nellis v. United States, 517 U.S. 690, 116 S. Ct. 1657, 1662, 1663 (1996).

In various contexts entry into a home has been held to be reasonable where consent has been obtained from either the individual whose property is searched or from a third party with common authority over the premises. The United States Supreme Court case most often cited in third party consent cases is United States v. Matlock, 415 U.S. 164 (1974). In Matlock the United States Supreme Court determined that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent

was given by the defendant, but the prosecution may show that permission to search was obtained from a third party who possessed common authority over, or other sufficient relationship to, the premises or effects to be inspected. Matlock at 171.

The Wisconsin Supreme Court has applied the Matlock decision to third-party consent cases. In State v. Kieffer, 217 Wis. 2d 531 (1998), the court addressed the propriety of a search and seizure conducted pursuant to the consent of the defendant's father-in-law, who owned a garage containing the defendant's loft living area. In Kieffer it was held that the State had not established that the owner had actual authority or apparent authority to consent to the search of the defendant's living quarters. Citing Matlock, it was observed that the sufficiency of the consenting individual's relationship to the premises to be searched must be established by the State. Kieffer at 542.

Another case where the Wisconsin Supreme Court applied the Matlock decision was State v. West, 185 Wis. 2d 68, 517 N.W. 2d 482 (1994). In West the Supreme Court upheld the use of evidence found in the search of a parolee's residence against a nonparolee roommate. In West the court cited Matlock in support of its treatment of the search as if consent had been given by the parolee due to the parolee's common authority over the premises. In West, in a footnote,

the court addressed the dissent's concerns that persons would forfeit their Fourth Amendment rights if they continued living with, among others, their children. West at 97,n20. That is a concern we believe this court must consider when fashioning rules governing consent by children.

B. DECISIONS FROM OTHER JURISDICTIONS.

According to Professor LaFave, "...appellate courts have only infrequently had occasion to consider the situation ... in which ... consent was given by a child to search a home where the child lives with his parents. Consistent with the notion, frequently relied upon in upholding parental consent, that the parent's interest in the premises is superior to that of the children, it would seem as a general proposition that under the Matlock common authority formula it cannot be said that a child has authority equivalent to that of his parents to permit a full police search of the family home." See 3 Wayne R. LaFave, Search and Seizure, 8.4c at 771,(3rd ed.)

Even though, as Professor LaFave points out, a child does not have authority equivalent to that of his parent to allow entry into the home, rather than adopting a pro se rule that a minor could never consent to entry, it appears that the majority of cases from other jurisdictions address the question of a child's authority to consent to enter on a case-by-case basis. (See State v. Kriegh, 937 P. 2d 453, 457

(Kan. App.1997) and cases cited therein. Since it is undoubtedly correct however that a child's authority to allow entry into a house is not coextensive with the authority of his or her parent, the questions become, in an individual case, did the State show that the child had authority to consent and did the child actually consent?

It is our contention that Saavedra v. State, 622 So. 2d 952 (Fla, 1993), sets forth a reasonable approach for determining the existence and extent of a child's authority to allow consent to entry. In Saavedra it was held that an entry by officers into a house was illegal. In that case the officer went to the rear door of a residence and knocked. A young man, later identified as the defendant's 15-year old son, answered the door. According to the officer, the officer identified himself and told the boy that he needed to speak to an adult. The boy then gave the officer permission to enter the home. The officer entered the home and walked past the boy to a nearby bedroom where he arrested one of the defendants. Two other officers entered the home and arrested the defendant, Saavedra, in another bedroom. The next morning the police obtained Saavedra's consent to search his home where they found clothing and a hood worn during a sexual assault.

The Saavedra court held that the entry was illegal. The court noted that the issue in the case was whether the police

could make a warrantless entry into a suspect's home to make a felony arrest.[1] The court held that the State must show by clear and convincing evidence from the totality of the circumstances that the minor gave free and voluntary consent. In addition, because the minor shared the home with a parent, the consent had to satisfy the third-party consent test. The Florida court then adopted the common authority test set out in Matlock to determine whether a minor may grant consent to allow a police officer entry into a parent's home. Saavedra at 957. In applying the Matlock test the Florida court required trial courts to determine whether the police officer had a reasonable belief based on articulable facts that the minor shared joint authority over the home with the parent. In determining the reasonableness of the police officer's belief, trial courts were instructed to consider the minor's age, maturity and intelligence. The court went on to say that trial courts should also consider any other facts that might

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The court, in a footnote, observed that although the issue in this case is entry into a home to make a warrantless arrest, rather than to conduct a warrantless search, the United States Supreme Court does not distinguish between the two in determining reasonableness under the Fourth Amendment. Payton v. New York, 445 U.S. 573, 589-90, 100 S. Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980); see also Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2791, 2797, 111 L.Ed.2d 148 (1990) ("The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects.")

show that a police officer reasonably believed that a minor shared joint authority over the home, such as whether the minor had permission to allow entry into the home, whether the minor had a key to the home, and whether the minor shared household duties with the parent. Saavedra at 958.

After examining the evidence adduced at the suppression hearing the Saavedra court found that the entry was illegal.[2] The court noted that the officer's testimony showed that he did not conduct an inquiry or elicit any facts by which he could reasonably determine that the boy who answered the door had common authority over the house. Thus, it was found that the officer acted unreasonably and that the entry was without valid third party consent.

Two concurring opinions in the Saavedra case pointed out the troubling aspects of obtaining consent from minors. It was pointed out that parents and teachers routinely teach children to respect authority and trust the police, therefore it was recognized that the burden of the State to prove consent had to be a heavy one. As noted in one of the concurring opinions:

> The consent issue becomes quite complex when dealing with the police's reliance on the consent of a juvenile. In such cases courts face unique practical problems. Minors, especially children of

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[2] The case is reproduced in the appendix including the applicable testimony from the suppression hearing.

tender years, are almost always going to consent to a police officer's request. Parents and teachers routinely teach children to distrust strangers, respect authority, and trust the police. As a result, children commonly acquiesce to a law enforcement officer's assertion of authority.

...

Yet another troubling consequence in allowing juveniles to consent to police searches is the extent to which law enforcement may seek to rely on this rule. This decision must not be construed as an invitation to look for opportunities when officers know a juvenile is present in the home they wish to search without a warrant. The rule must be narrowly applied so as not to carve out a "juvenile's consent" exception to the Fourth Amendment warrant requirement.

I am compelled to conclude, as the majority does, that the burden on the State to prove voluntary authorized consent must be a heavy one and must be strictly adhered to. It follows that *some* minors are capable of exercising the kind of discretion necessary to consent to police action under certain circumstances. Cases cited in the majority's analysis, and other cases on the subject, correctly embody many criteria that officers and courts should consider in determining the validity of consent. Such factors include the youth's physical, mental, and emotional age, maturity, and intelligence; the child's understanding of the right to decline consent; the ability to understand the consequences of his or her actions; the child's right of access to the premises (such as guest or resident, permanent or temporary, recent or long-established, possession of or access to a key); whether the child commonly was left alone on the premises; the scope of access the youth shares with others (common areas such as kitchen and yard as opposed to more private areas such as bedrooms and bathrooms); the child's right of invitation (such as whether he or she has permission to invite friends into portions of the home at certain times of day); special instructions given to the child by others who share access to the property; the time of day and related circumstances under which officers seek access; representations officers make

> to the child when they seek consent; whether others who share access to the premises are present or reasonably available in order to vitiate the need to seek the minor's consent; and whether somebody with access had already declined to consent.

Saavedra at 962.

It is our opinion that the Saavedra case identifies the concerns and implications of allowing juvenile consent. Consistent with those concerns we believe that Saavedra sets out a reasonable methodology for determining whether consent has actually and voluntarily been given. First, the State must show by clear and convincing evidence from the totality of the circumstances that the minor in fact gave consent. Next, the state must show that the officers had , at the time of entry, a reasonable belief based on articulable facts that the minor shared joint authority over the premises searched. Clearly, merely answering the door would not suffice. Many factors should be taken into account when assessing the reasonableness of the officer's belief. It is clear from Saavedra that the burden is meant to be a high one and that inquiry is required of the officers to establish a juvenile's authority.

For the above reasons, we believe that the doctrine of apparent authority is of limited utility in juvenile consent cases. This belief is consistent with Professor LaFave's observation that children can rarely be considered to have common authority over their residence. We believe that a

strict application of Matlock results in a common sense presumption against the notion that children can generally give consent to enter.

We believe that the rules regarding consent by children must be strict otherwise the concerns raised by the dissent in West regarding the possible forfeiture of Fourth Amendment rights by parents will be borne out.

C. IT WAS NOT ESTABLISHED THAT THE GIRL WHO ANSWERED THE DOOR ACTUALLY CONSENTED OR HAD AUTHORITY TO CONSENT TO ENTRY BY THE OFFICERS.

As stated previously, a bat was admitted into evidence at trial. It was State's Exhibit 9 (R. 44:76). The bat was seized from the defendant's home by Detective Kuchenreuther on February 27, 1999. On that date Detective Kuchenreuther and four other officers went to the defendant's home. The record indicates that it was their intention to arrest Mr. Tomlinson at that time. The officers did not obtain a warrant for the defendant's arrest nor did they obtain a search warrant (R. 44:14, 15).

A suppression hearing was held on June 15, 1999, which was the second day of the trial. At the suppression hearing Detective Kuchenreuther was the only witness. He testified that he had been employed with the City of Milwaukee as a police officer for 16 years and was so employed on February

27, 1999. The detective testified that at 8:50 p.m. on that date he and other officers went to a dwelling located at 2948 N. 11th St., City and County of Milwaukee. The detective testified that when he went to the defendant's house, he was met by a black female, 15-16 years of age, who opened the door (R. 44:9). The detective testified that Mr. Tomlinson was standing behind the girl when she opened the door. The record does not reflect the identity of the girl who opened the door. (During the trial, immediately after the suppression hearing, he testified that the defendant's daughters were 14 and 15 years old. He also gave their names. (R. 44:74). The defendant was then placed under arrest along with his wife and daughters. The bat was subsequently seized.

On cross-examination at the suppression hearing the detective testified, when asked whether he received permission to enter the house, that he was "allowed into the house". When asked on cross-examination how he was allowed in, the detective testified that the door was opened for him by the occupants. He testified that he knocked before it was opened and that he identified himself as a detective. He stated that he indicated that he was there looking for John Tomlinson. When asked what was said to make him believe that they were let in, the detective testified that, "well, they opened the door and we went in" (R. 44:13). The detective indicated that the door was opened in response to his knock and he walked in.

The detective testified that as far as he knew the people in the house had never seen him before (R. 44:13), and that no further words were passed other than he asked if he could come in and that he was looking for John Tomlinson (R. 44:13). Upon the door being opened, the girl walked into the house and the detective followed the girl in, without the detective recalling anything else that might have been said (R. 44:13, 14). Detective Kuchenreuther testified that he was with Detective Domaglaski, Detective Harrison and Police Officers Brian Haas and Larin Young (R. 44:14).

On this record, it cannot be held that the State has met its burden to show that the minor child who answered the door had authority to consent to the entry by the officers. The record does not identify who the child was that answered the door. It can only be guessed whether or not the minor lived on the premises, whether the minor had a right of access to the premises, or the right to invite others into the premises. As in Saavedra, the officer made no inquiry into the child's authority to consent to entry. Because of the lack of inquiry, nothing is known about the girl other than that she was there and that she answered the door. The state certainly did not establish that she had authority to allow entry.

Also, consent to enter cannot be inferred on this record. The actions of the young girl answering the door were entirely consistent with a person turning away from the door

in order to inform either the owner of the house, the persons living there, or a parent, that someone was at the door to speak with them. It seems to be an odd inference that any time a minor answers the door and silently turns away, rather than closing the door in an officer's face, that the minor has given consent to enter the premises. We believe that the law, in cases not involving minors, requires more proof of consent than we have here. Clearly, the state must show more than we have here in a case involving consent by a minor.

We respectfully request therefore that the Court of Appeals' decision be overturned and that the defendant's judgment of conviction be set aside.

II. THE USE OF OTIS COLEMAN'S PRELIMINARY HEARING TESTIMONY AT TRIAL VIOLATED THE DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

A. Factual Background

At trial, the State's key witness was to be Mr. Otis Coleman. At trial Mr. Coleman was called to the stand outside the presence of the jury. Mr. Coleman had testified previously at the preliminary hearing. Mr. Coleman was initially called by the state to testify at the preliminary hearing on March 11, 1999 (R. 37). At that time he was in custody on a probation hold. (R. 37:30). Mr Coleman requested an opportunity to speak with an attorney, at which time the preliminary hearing was halted (R.37:31). The preliminary

hearing was continued to that afternoon. That afternoon the hearing was continued to March 16, 1999 to determine what steps would have to be taken to obtain the testimony of Mr. Coleman(R48:8-10).Mr. Coleman testified at the continued preliminary hearing after his release from custody was arranged. It was made clear to Mr. Coleman that his release would not be arranged unless he testified. (R.33:44-47).

When called to the stand at trial Mr. Coleman refused to testify. When called he was in custody on a probation hold as had been at the time of the preliminary hearing. At trial he was asked whether he was willing to answer questions regarding his knowledge of the death of the victim. He invoked his fifth amendment rights. Mr. Coleman testified that answering any questions might tend to incriminate him (R. 44:90). He also indicated that he didn't think that he was mentally stable enough to answer questions about anything. He testified that he was stressed by the "finalgating". The court asked Mr. Coleman if he was willing to answer questions at all regarding his knowledge of the homicide. Mr. Coleman indicated "No" (R. 44:91), that he "must invoke the fifth" (R. 44:91). The court again asked whether he was willing to testify regarding the topic on which he testified earlier. Mr. Coleman again invoked his fifth amendment rights. When asked by the court what he meant by invoking his fifth amendment rights, he answered "I do not wish to say anything

that might tend to incriminate me or to get me harmed in any way, shape or fashion". He indicated that he did not want to be harmed by the court or anybody (R. 44:91). Mr. Coleman was asked if he was fearful of retaliation for being known as a "snitch" if he cooperated. After that question he invoked his fifth amendment rights (R. 44:93). The court ordered Mr. Coleman to answer the question. He never did. Mr. Coleman was again asked whether he was refusing to answer any questions about his knowledge of who murdered Louis Phillips on February 5 and 6th, 1999 (R. 44:94). He again invoked his fifth amendment rights. He did testify that he knew Louis Little, the victim (R. 44:94). He was asked whether he was with Mr. Little on February 6, 1999 at 1134 W. Chambers Street, and who, if anyone, he saw strike Louis Phillips with a bat on February 5th or February 6th, 1999. To both questions he invoked his fifth amendment rights (R. 44:94, 95). Mr. Coleman was asked by defense counsel whether he felt that he was afraid that the judge might hurt him if he testified, to which Mr. Coleman responded "the judge, you, the plaintiff's family, everybody". Mr. Coleman was asked whether he told the truth, to which he stated that counsel was making him feel like he killed somebody. Defense counsel asked him if he did, and Mr. Coleman invoked his fifth amendment rights (R. 44:95, 96). Mr. Coleman was specifically asked whether he testified truthfully under oath at the preliminary hearing, to which he

invoked his fifth amendment rights (R. 44:96). The State then asked that Mr. Coleman be found unavailable under sec. 908.04 (1) (a) and (b) Stats. Defense counsel asked that the court find Mr. Coleman in contempt. Defense counsel noted that he didn't think there was a suitable basis to invoke the fifth amendment privilege. He noted that Mr. Coleman had disobeyed a court order. Counsel asked that Mr. Coleman be found in contempt and brought back first thing the next day to give him a chance to purge by testifying. The trial court felt that it was not allowed to delve into whether Mr. Coleman had legitimately invoked his fifth amendment right and felt that it could not order him to waive the privilege.(R.44:98) The court then found him unavailable to testify. In its decision on the postconviction motion the trial court determined that Mr. Coleman was properly found to be an unavailable witness (R. 32). The Court of Appeals also determined that Mr. Coleman was an unavailable witness. Therefore it affirmed the trial court.

B. Law and Standard for Review

Generally, "[t]he admissibility of former testimony [under Wis. State sec. 908.045(1)] is discretionary with the trial court," subject to review for an erroneous exercise of discretion. State v. Drusch, 139 Wis. 2d 312, 317-18, 407 N.W. 2d 328 (Ct. App. 1987).

An appellate court will find an erroneous exercise of discretion "if the record shows that the trial court failed to exercise its discretion, the facts fail to support the trial court's decision, or [the appellate] court finds that the trial court applied the wrong legal standard." Oostburg State Bank v. United Sav. & Loan Ass'n, 130 Wis. 2d 4, 11-12, 386 N.W. 2d 53 (1986).

Nevertheless, where as in this case, the focus of the trial court's ruling is on the constitutional right of the defendant to confront the unavailable witness, the issue is more properly characterized as one of constitutional facts subject to independent review. Cf. State v. Stutesman, 221 Wis. 2d 178, 182, 585 N.W. 2d 181 (Ct. App. 1998) ("[w]hether a trial court's ruling excluding evidence deprived a defendant of the constitutional right to present evidence is a question of 'constitutional fact,' which we review de novo"); In Interest of Michael R. B., 175 Wis. 2d 713, 720, 499 N.W. 2d 641 (1993) (same).

Moreover, where as in this case, the trial judge did not preside at the preliminary hearing, this court is in as good a position as the trial court to determine the admissibility of the preliminary hearing testimony of the unavailable witness. Cf. State v. Coogan, 154 Wis. 2d 387, 395 n.1, 453 N.W. 2d 186 (Ct. App. 1990) ("when the original trial and new trial motion are before different judges, a motion for a new

trial on the basis of newly-discovered evidence is subject to de novo review on appeal"); State v. Poole, 131 Wis. 2d 359, 361, 389 N.W. 2d 40 (Ct. App. 1986) (appellate court "appl[ies] the law to undisputed facts without deference to the trial court").

Regarding unavailability, Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed 2d 597 (1980), provides that "in sum, when a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable".

Case law indicates that the privilege against self-incrimination protects any disclosure the witness reasonably believes could be used, or could lead to other evidence that could be used, in criminal prosecutions. State v. Hall,207 Wis.2d 54, 557 N.W.2d 778. The privilege against self incrimination presupposes a real danger of legal detriment rising from the testimony. Rogers v. U.S., 340 U.S. 367, 373 (1951).

It has been held that "despite its cherished position, the 5th Amendment addresses only a relatively narrow scope of inquiry. Unless the government seeks testimony that will subject its giver to criminal liability, the constitutional right to remain silent absent immunity may not arise. An individual therefore properly may be compelled to give testimony. Garner v. United States, 424 U.S. 648 (1976).

It has specifically been held that it is for the court to say whether a witness is entitled to the privilege. The United States Supreme Court has held that the 5th Amendment "... protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer ... . The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself - his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified ... and to require him to answer if it clearly appears to the court that he is mistaken. "Hoffman v. United States, 341 U.S. 479 (1951).

It has been held that a fear of reprisal is not a valid basis upon which to assert the 5th Amendment privilege. DuPuy v. United States, 518 F. 2d 1265, (9th Circ. 1975).

C. Mr. Coleman Should Not Have Been Found to Have Been An Unavailable Witness.

It is clear from the above principles of law that a trial court can, and should, delve into the legitimacy of a witness's invocation of the 5th Amendment. In this case the court could have, as requested by counsel, required Mr. Coleman to testify. The facts of record do not establish that Mr. Coleman, in fact, had a legitimate 5th Amendment claim. At one point he indicated to the trial court, when he refused to testify at the trial, that he was afraid of the judge.

Also there was an indication that his refusal to testify was based in part on a fear of reprisal for being a "snitch". Mr. Coleman was apparently required to testify in another homicide trial, and, according to a State memorandum, a copy of which is found in the appendix, Mr. Coleman was afraid that guys in the "Flippin" case would get him if he was in jail (R. 33:44-47).

It is asserted that Mr. Coleman did not establish a legitimate basis for invoking the fifth Amendment. The trial court was mistaken when it determined that it could not delve into his reasons for invoking the Fifth. The trial court under these circumstances should have ordered Mr. Coleman to appear the next day and testify as requested by defense counsel or should have excluded the testimony.[3]

The Court of Appeals determined that Coleman was an unavailable witness. The Court of Appeals did not comment on the trial court's belief that it could not delve into the legitimacy of Coleman's invocation of the 5th Amendment. The

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[3] It is clear that Mr. Coleman's testimony was viewed as crucial by the State. The State offered, prior to the trial court's decision to admit the preliminary hearing testimony, that if the defendant would plead to first degree reckless endangering safety, a 5 year maximum sentence, the State would recommend a sentence of probation (R. 44:84). That offer was withdrawn after the court made its ruling regarding the preliminary hearing testimony.

Court of Appeals determined that the record clearly demonstrated that Coleman persistently refused to answer the questions and that there was no offer of proof that further inquiry would have made a difference to Coleman. (Court of Appeals Decision - P. 13). It is our contention that it was the mistaken belief of the trial court that it could not delve into the legitimacy of the witness's invocation of his right not to testify that permitted the witness to believe that he did not have to testify. The trial court should have ordered the witness to appear the next day and testify as requested by defense counsel or should have excluded the testimony. Given the nature of the case, i.e. a homicide case, and given the importance of Mr. Coleman's testimony, we believe that there are heightened constitutional protections for the defendant. "Confrontation clause concerns are heightened and courts insist on more diligent efforts by the prosecutors when a "key" or "crucial" witness's testimony is involved". See Mcandless v. Vaughn, 172 F.3d. 255 citing U.S. v. Foster, 986 F.2d 541,543(D.C. Cir.1993). The more important the witness to the government's case, the more important the defendant's right, derived from the confrontation clause of the Sixth Amendment. United States v. Lynch, 499 F.2d 1011,1022, (D.C. Cir. 1974). The defendant's interest is further heightened where the absent witness has special reason to give testimony favorable to the prosecution. Mcandless at 2. Here the

prosecution went to great lengths to obtain favorable testimony from Mr. Coleman at the preliminary hearing. Therefore, special sensitivity to confrontation clause concerns is appropriate. Mr. Coleman should not have been found to have been an unavailable witness.

III. A TRIAL COURT SHOULD PERSONALLY VOIR DIRE A DEFENDANT IF IT IS GOING TO INSTRUCT A JURY THAT AN INSTRUMENTALITY ALLEGEDLY USED DURING THE COMMISSION OF AN OFFENSE CONSTITUTES A DANGEROUS WEAPON.

A. Factual Background.

At the conclusion of the trial when instructing the jury on the use of a dangerous weapon, the court primarily relied on pattern jury instruction 990. The court's instruction to the jury was as follows:

> "If you find the defendant guilty, you must answer the following question. Did the defendant commit the crime of first degree reckless homicide while using, threatening to use or possessing a dangerous weapon.
>
> Before you may answer the question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while using, threatening to use or possessing a dangerous weapon to facilitate the crime.
>
> Dangerous weapon means a baseball bat"

(R. 45:64).

Shortly after reading the above instruction the district attorney asked for a sidebar at which time the jury was excused. The following exchange was conducted on the record:

MR. MOLITOR: Judge, I noticed -- it was my oversight. I didn't catch it the first time through. Under 990 the Court read a dangerous weapon means a baseball bat. I believe under 939 --

THE COURT: And that is the standard instruction.

MR. MOLITOR: It is. There's a footnote. I believe it's Footnote 4 in 990. The jury instruction committee suggests that a particular section of Statute 939.22(10) which defines dangerous weapon be used depending on the facts of the case. That section states, quote, "'Dangerous weapon.'" end quote, "means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in 941.295 (4); or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." I think -- In looking at that, I think the jury should determine -- it should be up to the jury to determine if a baseball bat is a dangerous weapon. In other words, if it is a device or instrumentality which, in the manner is it used or intended to used -- to be used, is calculated or likely to produce death or great bodily harm.

THE COURT: Of course it's a suggestion. And what does the defense want to do?

MR. JOHNSON: We want it the way it was read.

THE COURT: Okay.

MR. MOLITOR: Just so I understand, in fact, that's almost relieving the State of the burden to prove that a baseball bat is a dangerous weapon -- of proving that beyond a reasonable doubt if the Court instructs a dangerous weapon means a baseball bat. You understand that Mr. Coleman? (sic)

MR. JOHNSON: You want it the way we have it?

THE DEFENDANT: Yeah.

MR. JOHNSON: We want it the way you read it.

THE COURT; You want it the way it is?

MR. JOHNSON: We want it the way it is.

THE COURT: The way the Court read it?

MR JOHNSON: Yes.

THE COURT: The way the Court read it. And the defendant understands that?

MR MOLITOR: I couldn't hear him, Judge. I'm sorry.

MR. JOHNSON: He told me yes and I'm repeating it. He told me yes.

THE COURT: Let's bring the jury out.

(R. 45:67-69).

B. Law and Standard of Review.

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. In re Winship, 397 U.S. at 364. The burden of proving all elements of a crime beyond a reasonable doubt rests upon the State. Muller v. State, 94 Wis. 2d 450, 473, 289 N.W. 2d 570 (198).

A proper jury instruction is a crucial component of the fact-finding process. State v. Schulz, 102 Wis. 2d 423, 426, 307 N.W. 2d 151 (1981). The jury must determine guilt or guiltlessness in light of the jury charge, and the validity of that determination is dependent upon the correctness, and

completeness, of the instructions given. Id at 426-27. Elements of a crime are its requisite conduct, either an act or omission and mental fault. Elements may include particular attendant circumstances, and sometimes, a specified result of the conduct. See State v. Howard, 211 Wis. 269, 290., 564 N.W. 2d 753 (1997).

An inadequate jury instruction can provide a ground for reversal because it deprives the accused of a jury determination that he or she engaged in constitutionally prohibitable conduct made unlawful by statute. See Howard citing Osborne v. Ohio, 495 U.S. 103, 123-26 (1990). The court cannot direct the verdict of guilty no matter how overwhelming the evidence. Howard citing Duncan v. Louisiana. 391 U.S. 145, 149-50 (1968).

We believe the jury instruction in this case relieved the state of its obligation to prove all the elements of the offense. As such, the defendant was denied a jury determination on that element. Consistent with Howard, we believe that the judgment of conviction as enhanced must be set aside. In Howard the Wisconsin Supreme Court did not apply a harmless error analysis to an erroneously given jury instruction. The court noted that in Howard the jury was entirely precluded from considering whether Howard possessed a dangerous weapon to facilitate commission of the predicate crime. Therefore, the court in Howard determined that his

conviction on the penalty enhancer was fundamentally unfair. Howard at 292. The enhanced portion of his sentence was set aside. Just as in Howard, we requested that the court of appeals set aside the defendant's conviction as enhanced because the jury was entirely precluded from considering whether or not the bat as used constituted a dangerous weapon.

In State v. Moriarty, 107 Wis. 2d 622, 577 N.W.2d 324 (1982), the argument also was made that the trial court gave an incorrect jury instruction. That case involved the amendment of the armed robbery statute. At the time of trial it was no longer sufficient for the State to prove that the defendant was merely armed, the State also had to prove the use or threat of use of the weapon during the commission of the robbery. In that case an erroneous instruction was given and defense counsel failed to object. The Court of Appeals noted that it could, in it's discretion, consider whether a jury instruction mandates reversal, even where objection is clearly waived. Id at 630. The court noted that the test on review where a defendant contends that a jury instruction should be reviewed on appeal despite a waiver of objection is whether the error is so plain or fundamental as to affect the defendant's substantial rights. Id. The court noted that it is the established rule that objection to instructions is not waived when the instruction misstates the law. Id. In Moriarty the court noted that the State was required to prove

that Moriarty used or threatened use of a dangerous weapon during commission of the robbery and not merely that Moriarty was armed at the time of the taking. The court held that the instruction error was not harmless because the instruction allowed the State to be relieved of its burden to prove every fact essential to the crime charged. Id.

. In our case the Court of Appeals determined that the defendant had waived the argument that the jury instruction constituted plain error. The Court of Appeals determined that Tomlinson and his counsel made a knowing election between alternative courses of action, resulting in a strategic waiver of the instructional error. The court cited Shawn V.N. v. State, 173 Wis. 2d 343, 372, 497 N.W. 2d 141 (Ct. App. 1992) for the proposition that the defendant cannot create his own error by deliberate choice of strategy and then ask to receive the benefit from that error on appeal. The Court of Appeals felt that Tomlinson's single affirmative response "yeah" to the trial court in response to whether he wanted the jury to be told that a baseball bat was a dangerous weapon, was sufficient. The Court of Appeals stated that "Although a more in depth colloquy is required when a defendant waives his or her right to a jury trial, the same is not required when a defendant merely concede[s to] an element of the charged crime." (Court of Appeals Decision - P. 15). The Court of Appeals determined that Tomlinson's affirmative response was

not a waiver of his right to a jury trial on that element but a concession of that element of the charged crime. Accordingly the Court of Appeals concluded that Tomlinson's single affirmative response was sufficient to constitute a knowing waiver of the issue. The Court of Appeals relied on State v. Benoit, 229 Wis. 2d 630, 600 N.W. 2d 193 (1999). In Benoit, prior to his burglary trial, the defendant agreed not to challenge the issue of non-consent. At the close of evidence he repeated his intent. The jury was then instructed that because it was stipulated it was considered proven. The Benoit case however distinguished State v. Villareal, 153 Wis. 2d 323, 450 N.W. 2d 519 (Ct. App. 1989). We believe that Villareal is more to the point.

In Villareal the defendant was charged with first degree murder by use of a dangerous weapon. On the fourth day of trial, at the jury instruction conference, Villareal's counsel agreed that there was no dispute that Villareal used a dangerous weapon. The parties then stipulated that the jury would not decide that issue. No personal waiver was taken from the defendant. The court of appeals concluded that, absent an express personal jury waiver by Villareal, the trial court's determination of the issue violated Villareal's right to a jury trial.

We believe Benoit is easily distinguished from Villareal. In Benoit, when distinguishing Villareal, the Benoit court

stated:

> ...Benoit sought a jury trial on the issue of his involvement in the burglary. Prior to trial, he agreed not to challenge the issue of nonconsent so as to avoid having the restaurant owners testify. At the close of evidence he repeated his intention to waive the issue. The jury was then instructed that because the element of nonconsent had been stipulated, it was considered proven. Unlike Villareal, the nonconsent issue was not passed on to the court; instead, it was merely conceded by Benoit. Because the jury was instructed on all of the elements of the crime, Benoit received a jury trial on every element. His stipulation, therefore, did not constitute a waiver of his right to a jury trial; and, thus, Benoit did not need to make an express personal waiver to render the stipulation valid.

Benoit at 638. In Benoit, consistently through trial there was, in essence, an evidentiary stipulation that consent could be considered proven. Because the jury was instructed on all the elements of the crime however Benoit received a jury trial on every element.

Our case is very similar to Villareal, although, unlike in Villareal, it was not defense counsel, but the court, that determined to, in essence, direct a verdict on the dangerous weapon issue. We believe in our case, as in Villareal, at the least a knowing and voluntary waiver of a jury determination should have been taken. We disagree that the colloquy entered into between the court, defense counsel, the district attorney, and the defendant, could be construed as a knowing and voluntary waiver. The colloquy included one audible response from the defendant, i.e. "Yeah", when he was asked if

he wanted the instruction read the way the court had fashioned it (R. 45:67-69).

We believe that in this case there was no adequate voir dire of the defendant such that it can be held that he waived the erroneous jury instruction. In State v. Wallerman, 203 Wis. 2d 158, 552 N.W. 2d 128 (Ct. App. 1996), the Court of Appeals set forth a methodology for handling a stipulation to an element of a crime in order to prevent the introduction of "other acts" evidence. That methodology requires that the court personally voir dire defendants to ensure that they understand the effects of the concession. We believe such a methodology should be mandated in cases such as this. We believe that in this case the single audible response of the defendant falls far short of establishing the defendant's understanding of the concession. Therefore, the defendant's judgment of conviction as enhanced should be vacated and we request that the case be remanded for resentencing.

CONCLUSION

We believe that the bat seized from the defendant's home should have been suppressed. We also believe that the admission of the preliminary hearing testimony of Otis Coleman was error. The admission of that testimony violated the defendant's right to confront the witnesses against him. The testimony was crucial, since Mr. Coleman was the only eye-witness to testify that he saw the defendant strike the victim

with a bat. We believe that these errors require that the judgment of conviction be vacated.

Alternatively, we are requesting that the judgment of conviction as enhanced be vacated due to the improper jury instruction regarding the bat.

Dated: 1/15, 2002.

Respectfully submitted,

GRAU LAW OFFICE

By: _____
John J. Grau, Attorney for
Defendant-Appellant-Petitioner
State Bar No. 01003927

CERTIFICATION

I hereby certify that the foregoing brief is in nonproportional type with a courier font and is 36 pages long including this page.

Dated: 1/15, 2002.

Respectfully submitted,

GRAU LAW OFFICE

By: _____
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COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3134-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN TOMLINSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. John Tomlinson, Jr. appeals from a judgment entered after a jury found him guilty of first-degree reckless homicide, contrary to WIS. STAT. §§ 940.02(1), 939.05 and 939.63 (1999-2000).[1] He also appeals from

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

an order denying his postconviction motions. He raises three issues: (1) whether the trial court erred when it denied Tomlinson's motion seeking to suppress evidence; (2) whether the trial court erred when it allowed the State to introduce Otis Coleman's preliminary hearing testimony after Coleman asserted the Fifth Amendment during the trial; and (3) whether the trial court erred in instructing the jury that a baseball bat constitutes a dangerous weapon. Because the trial court's ruling on the suppression motion was not erroneous, because Coleman's preliminary hearing testimony was not erroneously admitted, and because the instructional error did not prejudice Tomlinson, we affirm.

I. BACKGROUND

¶2 At approximately midnight on February 5, 1999, Otis Coleman and Lewis Phillips were walking near the 1100 block of West Chambers Street in the City of Milwaukee. Tomlinson, his wife, and a third individual approached the pair and Phillips asked Mrs. Tomlinson for a cigarette. He offered to pay a quarter. Mrs. Tomlinson stated that she would sell one for fifty cents. Phillips responded, "a quarter, bitch." At that point, Tomlinson confronted Phillips for calling his wife a bitch. Tomlinson then told Phillips, "[y]ou better be here when I get back," and walked away. A couple of minutes later, Tomlinson returned wielding a baseball bat. Tomlinson swung the bat and hit Phillips in the left knee, causing him to bend forward. Tomlinson then swung the bat and struck Phillips in the left side of the head, causing him to fall to the ground. Coleman, fearing that the bat would be turned on him, left the area.

¶3 Angela Green was walking westbound in the 1100 block of West Chambers Street in the early morning hours of February 6, 1999, when she heard a woman yell, "kick the bitch in the head." She recognized this woman as Mrs.

Tomlinson. Shortly thereafter, she saw Mr. Tomlinson walking toward her carrying a baseball bat. His two teenage daughters, who were carrying broom and mop handles, were with him. After Green passed the Tomlinson family, she came upon Phillips who was bleeding from the head. Green pointed out the victim to Robert Haynes, who lived close to that area. Haynes went into his home and called 9-1-1.

¶4 Paramedics and police arrived at the scene and Phillips was transported to Froedert Memorial Hospital, where he died several days later from cerebral injuries due to blunt force trauma. The medical examiner indicated that Phillips's skull was fractured, consistent with a forceful blow to the head with a baseball bat.

¶5 On the evening of February 27, 1999, Milwaukee Police Detective Dennis Kuchenreuther and several of his colleagues were investigating the Phillips homicide. They spoke with Green, who provided a description of the Tomlinsons and the events she had witnessed. Green identified John Tomlinson from a photo array, and informed the detective that Tomlinson, his wife, and two teenage daughters lived at 2948 North 11th Street. Kuchenreuther and several other officers proceeded to the Tomlinson residence. Kuchenreuther knocked on the back door and identified himself as a police detective. He asked if they could come in to look for John Tomlinson. A black female aged fifteen or sixteen opened the door and allowed the officers to enter. John Tomlinson was standing behind the teenage girl, and did not object when the officers entered.

¶6 The police officers arrested Tomlinson, his wife Michelle, and the two daughters, Monterio and Kamisha, for the homicide of Phillips. After being placed under arrest, Michelle and the two daughters asked if they could put on

their socks and shoes, which were located in a bedroom. The officers allowed them to do so but, for safety reasons, followed them into the bedroom. When the police entered the bedroom, they saw, in plain view, a baseball bat and some broom or mop handles. Recognizing these items as the possible murder weapons, the police seized them as evidence.

¶7 Tomlinson was charged with first-degree reckless homicide, while using a dangerous weapon, as party to the crime. He pled not guilty and filed a motion seeking to suppress the evidence seized at the time of his arrest. The trial court conducted the suppression hearing, and Detective Kuchenreuther was the only witness to testify. The trial court found that the entry was consensual.

¶8 The case was tried to a jury in June 1999. During the trial, Coleman was called by the State. Outside the presence of the jury, Coleman refused to answer the questions posed, invoking the Fifth Amendment. Based on this refusal, the State moved to admit Coleman's testimony from the preliminary hearing. Over defense objection, the trial court ruled that Coleman was unavailable, and that his prior testimony could be admitted pursuant to WIS. STAT. § 908.045(1).[2] The trial court found that Coleman's reliability and credibility had been sufficiently challenged at the preliminary hearing to satisfy the confrontation rule. In addition, the trial court indicated that it would allow Tomlinson to introduce

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[2] WISCONSIN STAT. § 908.045(1) provides that if the declarant is unavailable, former testimony may be admitted. The pertinent portion states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

additional impeachment material, including Coleman's prior conviction record, prior statements, and a memorandum outlining the consideration Coleman received for cooperating in the investigation and testifying at the preliminary hearing.

¶9 After testimony was concluded, the trial court read the jury instructions. Specifically, the trial court advised the jurors:

> If you find the defendant guilty, you must answer the following question. Did the defendant commit the crime of first[-]degree reckless homicide while using, threatening to use or possessing a dangerous weapon.
>
> Before you may answer the question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while using, threatening to use or possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.
>
> Dangerous weapon means a baseball bat.

¶10 After instructions were complete, the State advised the court that the jury should be allowed to decide whether or not a baseball bat constituted a dangerous weapon, and the instruction given took that decision away from the jurors. In response to the State's concern, both defense counsel and Tomlinson indicated that they wanted to leave the instruction as it was read. The jury returned a guilty verdict.

¶11 Tomlinson filed postconviction motions, which were summarily denied. He now appeals.

II. DISCUSSION

A. Motion to Suppress.

¶12 The first issue is whether the entry into the Tomlinson home was consensual. The trial court, based on the testimony of Detective Kuchenreuther, found that the entry was consensual. We agree.

¶13 Our review of suppression rulings is mixed. ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891, *cert. denied*, 121 S. Ct. 2207. We will uphold the trial court's findings of fact if they are not clearly erroneous; however, we will independently determine whether or not the search was unconstitutional. ***Id.***

¶14 Consent to search is one of the well-established exceptions to the constitutional requirements of both a warrant and probable cause. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973).[3] The trial court found that the entry was consensual, based on the detective's testimony at the suppression hearing and inferences arising from the totality of the circumstances. That finding is not clearly erroneous. Detective Kuchenreuther testified at the suppression hearing that he knocked at the door, and when the teenage girl answered, he asked if he could come in. He indicated that the teenage girl opened the door and allowed him to enter. He also testified that Tomlinson was standing nearby and observing

[3] As in all Fourth Amendment search cases involving consent, the state has the burden of proving that the search was the result of "free, intelligent, unequivocal and specific consent without any duress or coercion, actual or implied." ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993) (citation omitted). "[T]he proper test for voluntariness of consent under the fourth amendment is whether under the totality of the circumstances it was coerced." ***Id.*** Coercion or duress was never asserted in the instant case and, therefore, we need not address it.

this, but he did not object to the detective's entry. We agree with the trial court that a reasonable inference arises from this testimony—that the individual who answered the door consented to the entry.

¶15 Tomlinson argues that this testimony could support the inference that the teenage girl merely turned to inform her parents that someone was at the door. Although we do not disagree that this is another rationally based view of the evidence, the trial court, after personally observing the testimony of Detective Kuchenreuther, found that the teenage girl expressly consented to the entry when she opened the door and allowed the officers to walk in behind her. The record supports the trial court's finding that the teenage girl's response to the detective's request to enter—opening the door, walking into the house, and allowing the officers to follow her into the house—was sufficient to convey her consent. ***Schneckloth***, 412 U.S. at 222 (gestures or conduct may convey consent to search).

¶16 Tomlinson argues, however, that the child who opened the door did not have the authority to consent to the entry. We disagree. Tomlinson contends that nothing in the record shows that the minor child who answered the door had authority to consent to the entry by the officers. This court acknowledges that this specific issue was not fully and completely addressed, primarily because the "authority to consent" was not raised until the postconviction motion. Nevertheless, we conclude that there is sufficient information in the record to establish that the teenage girl had actual authority to consent to the entry.

¶17 The evidence in the record strongly supports the logical inference that the girl who answered the door was one of Tomlinson's daughters. His two daughters were fourteen and fifteen years old. The police had been given a description of the family by Green, and were advised by Green that Tomlinson

lived with his wife and two teenage daughters. There was no other visitor or person mentioned. The third-party consent doctrine provides that a third-party may consent to enter a home when that third party has common authority over the premises to be searched. ***United States v. Matlock***, 415 U.S. 164, 171 (1974). Common authority has been referred to as the "mutual use of the property by persons generally having joint access or control for most purposes." ***Id.*** at 171 n.7. Here, it was not unreasonable for the police officers to believe that the teenage girl who answered the door was one of Tomlinson's daughters, and that she had mutual use of the property sufficient to consent to the entry.

¶18 Tomlinson suggests that the age of the teenage daughter prevents her from consenting to the entry of the parents' home; that a minor does not have "common authority" to consent to entry. We disagree. Although Wisconsin has not yet directly addressed the issue of a child's authority to consent to a search of his or her parents' home, we are persuaded by cases from other jurisdictions holding that a teenage child has actual common authority to consent to an entry, at least into the common areas of the shared home. ***Doyle v. State***, 633 P.2d 306, 308-09 (Alaska Ct. App. 1981) (teenager could allow police to enter living room to talk with father); ***Harmon v. State***, 641 S.W.2d 21, 23 (Ark. 1982) (sixteen-year old could admit police into home), *overruled on other grounds by* ***White v. State***, 717 S.W.2d 784 (Ark. 1986); ***Mears v. State***, 533 N.E.2d 140, 143 (Ind. 1989) (fourteen-year old could consent to entry); ***People v. Swansey***, 379 N.E.2d 1279, 1281-82 (Ill. App. Ct. 1978) (thirteen-year old could consent to entry; ***State v. Folkens***, 281 N.W.2d 1, 4 (Iowa 1979) (fourteen-year old could consent to entry); ***In re Anthony F.***, 442 A.2d 975, 978 (Md. 1982) (individual who appeared to be thirteen years old could consent to entry).

¶19 In determining whether a minor has actual authority to consent to the entry, two factors may guide the courts. The first factor is the age of the child because "as children grow older they ... acquire discretion to admit ... [persons] on their own authority." 3 Wayne R. LaFave, *Search and Seizure*, § 8.4(c), 773 (3d ed. 1996). In the instant case, although it is not clear whether the fourteen-year-old or fifteen-year-old daughter answered the door, either had the authority to consent to entry. Both girls are within the age where courts usually find that the child has acquired the discretion to admit persons on their own authority.

¶20 The second factor to consider is the scope of the consent and whether the entry was to a common area or a more private area of the family home. *Id.* Here, the consent was access into a common area of the home, the front entranceway and the kitchen, as opposed to the entire residence, or what could arguably be considered more private areas. In addition, the consent in this case was not solely that of a teenage girl. Detective Kuchenreuther testified that Tomlinson was nearby when the police entered and proceeded into the kitchen, and at no time did he object to the entry.

¶21 Based on the foregoing facts and circumstances, we conclude that the entry was constitutionally permissible; therefore, the trial court did not err in denying the motion to suppress.

B. Coleman's Testimony.

¶22 Tomlinson next argues that the trial court erroneously exercised its discretion when it allowed the State to read into evidence Coleman's testimony from the preliminary hearing because: (1) he was not afforded an adequate opportunity to confront Coleman at the preliminary hearing; and (2) Coleman was

not "unavailable" so as to justify admission of the former testimony under WIS. STAT. §908.045(1). We are not persuaded.

¶23 Whether or not former testimony should be admitted pursuant to WIS. STAT. § 908.045(1) is a discretionary ruling, subject to review under the erroneous exercise of discretion standard. ***State v. Drusch***, 139 Wis. 2d 312, 317-18, 407 N.W.2d 328 (Ct. App. 1987). We will not disturb a discretionary ruling if the trial court applied the proper law to the pertinent facts and reached a reasonable decision. ***Id.*** Moreover, whether Tomlinson's confrontation rights under the Sixth and Fourteenth Amendments to the United States Constitution, and art. I, § 7 of the Wisconsin Constitution were violated is ultimately a legal issue reviewed independently. ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

¶24 In ***State v. Bauer***, 109 Wis. 2d 204, 325 N.W.2d 857 (1982), the Wisconsin Supreme Court set forth the standard for determining whether the type of evidence challenged here may be admitted. First, we must consider whether the evidence fits into a recognized hearsay exception. ***Id.*** at 215. Here, Coleman's preliminary hearing testimony fits under WIS. STAT. § 908.045(1), which allows former testimony to be introduced when the declarant is unavailable. This testimony was given by Coleman in another proceeding, with the opportunity to develop the testimony by both the State and Tomlinson. Thus, the first step of the ***Bauer*** standard is satisfied.

¶25 Second, the confrontation clause must be considered. ***Id.*** at 215. This requires that the witness be unavailable and that the evidence "bear some indicia of reliability." ***Id.*** "If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible,"

unless "there are unusual circumstances which may warrant exclusion of the evidence." *Id.* The hearsay-rule exception for prior testimony recognized by WIS. STAT. § 908.045(1) is "firmly rooted." *Id.* at 216.

¶26 When Coleman was called to testify at the trial, the following exchange occurred:

> Q Mr. Coleman, are you willing to answer questions regarding your knowledge of the homicide of Lewis Phillips, also know as Little?
>
> A I would -- any questions asked here today, I would have to invoke my Fifth Amendment rights. It might tend to incriminate me. I don't care to do any talking about anything. I don't think that I'm mentally stable enough at the present time to answer any questions about anything.
>
> ....
>
> [The court then instructs Coleman to answer the question.]
>
> Q Are you willing to answer any questions at all regarding your knowledge of the homicide --
>
> A No.
>
> Q -- of February 5 of 1999 to February --
>
> A I must invoke the Fifth.
>
> Q Let me ask the question. From February 5 of 1999 to February 6th of 1999 at or about 1134 West Chambers Street, here in the City and County of Milwaukee, State of Wisconsin, the topic on which you testified at the preliminary hearing in this case?
>
> A I must invoke my Fifth Amendment rights.
>
> Q What do you mean you're invoking your Fifth Amendment rights?
>
> A I do not wish to say anything that might tend to incriminate me or to get me harmed in any way, shape or fashion.

Q Or get you what?

A Or harmed by you, the Court, anybody.

Q Is it my understanding you're to invoke your Fifth Amendment privilege regarding any questions asked of you about the topic I just brought up?

....

A About anything. I invoke my Fifth Amendment rights about anything you have to ask me.

¶27 The prosecutor then asked the trial court to order Coleman to answer the questions. The trial court stated that it was going to order Coleman to answer. Coleman then interrupted asking, "[c]an I invoke my Fifth Amendment?" The trial court responded that it was going to order Coleman to answer the questions. The questioning continued:

Q Are you fearful of retaliation for being known as a snitch if you cooperate in this case?

A I invoke my Fifth Amendment rights.

....

THE COURT: ... the Court's ordering you to answer that question.

THE WITNESS: I don't understand.

THE COURT: The Court orders you to answer the question.

¶28 Coleman then answered the question "in part." When the prosecutor asked him the next question, he again invoked his Fifth Amendment privilege, the trial court ordered him to answer, and Coleman indicated that he could not talk about the incident. When Tomlinson's counsel cross-examined Coleman, he again invoked the Fifth and refused to answer.

¶29 Tomlinson contends that the trial court should have persisted further with the witness, found him in contempt, and ordered him to answer each question. Although we do not disagree that such a course would have created a more complete record, the foregoing clearly demonstrates that Coleman persistently refused to answer the questions, and there was no offer of proof that further inquiry would have made a difference to Coleman. Accordingly, under the standard set forth above, the trial court was correct when it found Coleman to be "unavailable."

¶30 The next part of the test is whether the evidence demonstrates indicia of reliability. As noted, WIS. STAT. § 908.045(1) is a "firmly rooted" hearsay exception, so the reliability of the preliminary hearing testimony "can be inferred." ***Bauer***, 109 Wis. 2d at 216. Under the ***Bauer*** analysis, the only remaining question is whether there are any "unusual circumstances" for excluding the preliminary hearing examination. ***Id.***

¶31 Tomlinson contends that the case does present unusual circumstances, arguing that because preliminary examinations focus on probable cause, they do not provide an adequate opportunity to develop sufficient cross-examination. Having reviewed the preliminary examination transcript in the instant case, we cannot agree with Tomlinson's contention. Tomlinson's counsel clearly challenged the reliability and credibility of Coleman during the cross-examination at the preliminary hearing. Tomlinson's counsel questioned Coleman about the accuracy of his recollections, secured an admission that Coleman had been consuming alcohol, and questioned why Coleman abandoned Phillips while he was in obvious danger. It is well established that the Confrontation Clause is satisfied by the *opportunity* for effective cross-examination. ***Delaware v. Fensterer***, 474 U.S. 15, 18 (1985). Tomlinson was provided with the opportunity

to cross-examine Coleman at the preliminary hearing. Except in extraordinary cases, no inquiry into the *effectiveness* of the cross-examination is required. *Ohio v. Roberts*, 448 U.S. 56, 73 n.12 (1980).

¶32 In addition, the State stipulated to, and the trial court ordered, the admission of additional impeachment evidence to challenge Coleman's credibility, including his ten prior convictions, prior statements, and documentation revealing the consideration Coleman received for cooperating in the investigation and testifying at the preliminary hearing. Finally, Tomlinson failed to identify any evidence or cross-examination materials he was not allowed to offer to impeach Coleman's credibility.

¶33 For all these reasons, we conclude that the admission of Coleman's preliminary hearing testimony did not constitute an erroneous exercise of discretion and did not violate any constitutional confrontation rights.

C. Jury Instruction.

¶34 Tomlinson's last issue relates to the jury instruction, wherein the trial court advised the jury: "Dangerous weapon means a baseball bat." He argues that this constituted "plain error" and requires reversal. We disagree.

¶35 At the time the instruction was given, the prosecutor immediately intervened and, outside the presence of the jury, advised the court: "It should be up to the jury to determine if a baseball bat is a dangerous weapon." However, defense counsel stated: "We want it the way it was read." The trial court then questioned both defense counsel and Tomlinson to confirm that, indeed, they wanted the jury instructed that a baseball bat was a dangerous weapon. Tomlinson personally answered affirmatively.

¶36 Now, on appeal, Tomlinson asserts that the instruction constitutes plain error, despite his position at trial indicating he wanted the instruction read. Tomlinson has waived this argument. Tomlinson and his counsel made a knowing election between alternative courses of action, resulting in a strategic waiver of this instructional error. He cannot create his own error by deliberate choice of strategy and then ask to receive the benefit from that error on appeal. ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992).

¶37 Tomlinson argues that his single affirmative response, "yeah," to the trial court in response to whether he wanted the jury to be told that a baseball bat is a dangerous weapon was insufficient. We disagree. Although a more in depth colloquy is required when a defendant waives his or her right to a jury trial, the same is not required when a defendant "merely concede[s to] an element of the charged crime." ***State v. Benoit***, 229 Wis. 2d 630, 600 N.W.2d 193 (Ct. App. 1999). Here, Tomlinson's affirmative response was not a waiver of his right to a jury trial on that element, but a concession to an element of the charged crime. The jury was instructed on all of the elements of the crime, and Tomlinson received a jury trial on every element. Accordingly, we conclude that Tomlinson's single affirmative response under the facts and circumstances here was sufficient to waive this issue.

¶38 In a related argument, Tomlinson argues that his trial counsel was ineffective for failing to object to the trial court's instruction that a baseball bat is a dangerous weapon. We cannot agree.

¶39 In order to establish that he did not receive effective assistance of counsel, Tomlinson must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense."

Strickland v. Washington, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Tomlinson can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong: "'A defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶40 In assessing Tomlinson's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez***, 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently, ***id.*** at 236-37.

¶41 Looking at the facts of this case, we cannot conclude that trial counsel's performance was deficient or prejudicial. Tomlinson took the baseball bat and struck Phillips so hard in the knee that Phillips doubled over. Then Tomlinson swung the bat again and struck Phillips in the head, fracturing his skull, causing him to fall to the ground, and eventually killing him. There is no

reasonable probability that the jurors would not have found the baseball bat in this case to be a dangerous weapon.

¶42 Further, even if trial counsel objected to the instruction, the result of the proceeding would not have been different. Under these facts, the jury would have found that the baseball bat constituted a dangerous weapon. Accordingly, we reject Tomlinson's claim that his trial counsel provided ineffective assistance.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 38 | MILWAUKEE COU

State vs John Tomlinson

JUDGMENT OF CONVICTION

Sentence to Wisconsin State Prisons

Date of Birth: 09-23-1964

Case No.: 99CF001079

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	1st-Degree Reckless Homicide [939.05 Party to a Crime] [939.63 Use of Dangerous Weapon]	940.02(1)	Not Guilty	Felony B	On or About 2-5-99 to 2-6-99	Jury	06-17-199

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	07-16-1999	State Prisons	38 YR		DOC
1	07-16-1999	Restitution		To be paid by use of up to 25% of prison wages as to funeral expenses, medical bills - family members to be paid first.	
1	07-16-1999	Costs		To be paid by use of up to 25% of prison wages.	

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA An Surcharg
	60.00		TBD	54.00	70.00		

IT IS ADJUDGED that 140 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

Jeffery A Wagner - 38, Judge
William J Molitor , District Attorney
Richard J Johnson, Defense Attorney

BY THE COURT:

Lisa Repnik

~~Circuit Court Judge~~/~~Clerk~~/Deputy Clerk

7-19-99

Date

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

CR-212(o) 5/99 Judgment of Conviction

§§939.50, 939.51, 972.13, Chapter 973 Wisconsin Sta

STATE OF WISCONSIN | CIRCUIT COURT Branch 38 | MILWAUKEE COUNTY

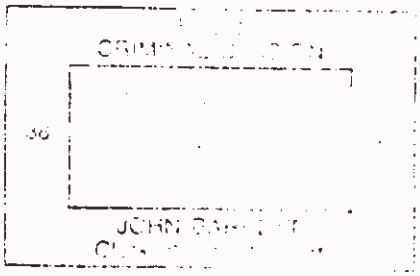
STATE OF WISCONSIN,

Plaintiff,

vs.

JOHN TOMLINSON,

Defendant.



Case No. 99CF001079

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On August 15, 2000, the defendant by his attorney filed a motion for postconviction relief alleging the ineffective assistance of counsel. The court set a briefing schedule to which the parties have responded. The court has reviewed the arguments presented, the transcripts on file, and the applicable law. It denies the motion for the following reasons.

The defendant was charged with first degree reckless homicide while using a dangerous weapon (party to a crime). The charge stemmed from an altercation that occurred on February 6, 1999 in which he struck the victim, Lewis Phillips, several times with a baseball bat. At the preliminary hearing, the medical examiner, Dr. Huston, testified that there were two blows to the head which were substantial factors in causing the victim's death. (Tr. 3/11/99, pp. 16-17). Angela Green testified that in the early morning hours of February 6, 1999, she saw a man walking down the street with a baseball bat around 12th and Chambers. (Id. at 19-20). She indicated the bat was beige colored with red on it. (Id. at 21). She said she then saw a man laying on the sidewalk at 1134 West Chambers bleeding from gashes in his face. (Id. at 23-24).

She identified the defendant as the person she observed with the baseball bat that night. (Id. at 24). She further indicated that she had seen him around the neighborhood and knew his name was "Red." (Id. at 24-25). Otis Coleman was also slated to testify, but the hearing was adjourned because he had asked for counsel to represent his interests. (Id. at 29-30).

On March 16, 1999, Otis Coleman returned to testify on behalf of the State. He indicated that in the early morning hours of February 6, 1999, he was walking with Lewis Phillips, also known as "Little," around 11th and Chambers. (Tr. 3/16/99, p. 4). He stated that he saw a person that he knows as Rob walking with two other people (a male and a female) and that the female had cigarets. (Id. at 4-5). Coleman indicated that the victim asked the female for a cigaret, offering to pay her a quarter, and she replied, "[A] quarter; I have to have .50, nigger." (Id. at 5-6). He said Phillips replied, "[A] quarter, bitch." (Id. at 6). At this time, Coleman stated that the black male -- the defendant -- stepped up and asked, "[W]hat did you call my wife?" (Id. at 6).

Coleman further testified when the defendant came towards Phillips, Phillips replied, "I said bitch," and the two then paced around each other as if they were about to fight. (Id. at 7). Coleman said he then apologized to the defendant for Phillips' response, and the defendant backed off, saying he wanted to whip Phillips' ass. (Id. at 8). The defendant told Phillips to "be there when I get back." (Id.). The defendant then left.

Coleman stated that he and Phillips continued to walk towards 12th and Chambers, and the defendant subsequently "came up out of nowhere carrying a baseball bat." (Id. at 9-10). He testified the bat was pine-colored like a major baseball player would use and the defendant yelled something. (Id. at 10-12). The defendant circled in front of them and cut off their path.

(Id. at 12). He and Phillips were face to face, and Coleman was about eight to ten feet behind them. (Id.). Coleman testified that Phillips told the defendant it wasn't that serious, and the defendant responded that it was and hit him with the bat in the leg. (Id. at 13). He said that Phillips bent over and repeated it wasn't that serious, and the defendant said it was and forcefully hit him on the left side of his head. (Id. at 13-14). He testified that Phillips "kind of went forward and then he fell backwards." (Id. at 14). Coleman tried to assist Phillips, but the defendant told him to move around, and he heard the bat come down again as he tried to move out of the way. (Id. at 15). The defendant told him to "move around," and Coleman said he then left the scene. (Id.). He stated that Phillips did not appear conscious at the time he tried to assist him. (Id. at 16).

At a trial held on June 15 - 17, 1999. Police Officer Thomas Waukau testified that he was dispatched to 12th and Chambers on February 6, 1999 at 12:05 p.m.[sic], where he saw fire department personnel attending to a man on the ground. (Tr. 6/15/99, p. 40). The person was identified as Lewis Phillips, and Officer Waukau testified that he saw blood coming from his ears and mouth and "all about his head." (Id. at 41). Police Officer John Rupcic testified that he accompanied Phillips to Froedtert Memorial Hospital on February 6, 1999 and that Phillips had several lacerations to his head. (Id. at 46).

Robert Haynes testified that he lived close to the area and that shortly after midnight he exited his home and saw a woman named Angela Green, whom he knew. (Id. at 48-49). She pointed out the victim, who was bloody and who was trying to sit up. (Id. at 49). He told her to see if he was all right, and he went back to his house to call 911. (Id.). He stated that the

fire department, paramedics, and police officers arrived. (Id. at 50).

Dr. Butch Huston testified that the victim's medical records revealed that the victim was treated from February 6 - 11, 1999 at Froedtert Memorial Hospital and that he died on February 11, 1999. (Id. at 55). He stated that an autopsy on the victim revealed a laceration and an abrasion to the head, a skull fracture, hemorrhages, and bleeding into the tissue underlying the abrasion and around the laceration. (Id. at 56-57). He further stated that both the laceration and the abrasion were caused by blunt force trauma. (Id. at 59). He indicated that Lewis Phillips had died from cranial cerebral injuries and that the injuries could have been caused by a baseball bat. (Id. at 62).

Detective Dennis Kuchenreuther testified that on February 27, 1999 he spoke with Angela Green who had given him information about the whereabouts of the person she saw walking away from the victim with a baseball bat on February 6, 1999, to wit, the defendant who lived at 2948 North 11th Street. (Id. at 73). Green identified the defendant from a photo array and pointed out his house. (Id. at 74). Detective Kuchenreuther went to the defendant's house and observed a bat, along with some broomsticks and mop handles, against a bedroom wall. (Id. at 74-75). He indicated he did not see blood on the bat, but that it was sent to the State Crime Lab for analysis. (Id. at 79-80).

Otis Coleman was called to testify and pled the Fifth Amendment, stating he would not testify to anything. (Id. at 90). The court found him unavailable as a witness pursuant to sections 908.04(a) and (b) and 908.045(1), Wis. Stats. (Id. at 98). The parties stipulated that he had ten prior convictions and that Angela Green had three prior convictions. (Id. at 100, 104).

Angela Green testified that in the early morning hours of February 6, 1999, she was walking up Chambers Street and noticed three people walking towards her on the same side of the street. (Tr. 6/16/99, pp. 7-8). She stated one was a man, carrying a bat, and the two others were girls carrying sticks or mop handles. (Id. at 8). She indicated that the bat was beige and she saw red on the bat. (Id.). She passed them between 11th Lane and 12th Street, and she identified the defendant as the man she saw carrying the baseball bat. (Id. at 15, 17). Green testified that she had seen him in the neighborhood and had known him as "Red." (Id. at 17). Green further testified that as she reached 12th and Chambers, she saw what she thought was a garbage bag laying on the sidewalk, but it was a person; she said Mickey Haynes came out of his house, and she told him to call 911. (Id. at 18). She indicated that the man's forehead looked like it was "bust open" and blood was coming from his head. (Id. at 19). She identified what appeared to be the baseball bat she saw the defendant with. (Id. at 19). She also stated she had been convicted of a crime three times. (Id. at 22).

On cross examination, defense counsel elicited information from Green to the effect that she was currently being held in jail and that she wanted to get out of jail. (Id. at 23). She stated that she had smoked some cocaine a couple of hours earlier on February 5, 1999. (Id. at 25). She stated she went home after the fire department came. (Id. at 27).

The parties then read Otis Coleman's testimony from the preliminary hearing transcript of March 16, 1999 (Exhibit 25). (Id. at 31).

The State also stipulated to the fact that the State Crime Lab did not find any evidence of blood on the baseball bat found in the defendant's home. (Id. at 35).

The defendant opted not to testify.

The defendant now contends that he was denied his right to the effective assistance of counsel when counsel failed to object on confrontation grounds to Coleman's testimony in the form of the preliminary hearing transcript. Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 694; also State v. Johnson, 153 Wis.2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. State v. Moats, 156 Wis.2d 74, 101 (1990).

Pursuant to State v. Bauer, 109 Wis.2d 204 (1982) and section 908.045(1), Wis. Stats., the court properly permitted the use of Coleman's testimony from the preliminary hearing. He was not an accomplice, as in State v. Myren, 133 Wis.2d 430 (Ct. App. 1986), and the defense was given an opportunity to cross examine Coleman at the preliminary hearing. The court determines that the opportunity to cross examine Coleman, and actual cross examination of the witness, sufficiently satisfies the confrontation clause.

> The fact that the cross-examination may have been less extensive than would be allowed at trial is not determinative. Nor does the fact that other cases have ascribed some importance to the existence of corroborating evidence alter the result in this case . . . . While corroborating evidence certainly enhances the reliability of the prior testimony of an unavailable witness, it is not a requisite to its admission. . . .

Bauer, 109 Wis.2d at 220.

The court agrees with the State that the defense had an opportunity at the preliminary hearing examination to "sufficiently probe Coleman's credibility and discredi[t] him." (*Corrected Response, p. 13*). The record speaks for itself, and the court will stand by the record.

In addition, the defendant contends that the court should have investigated further into Coleman's reasons for not testifying and should have compelled him to testify at trial. Coleman adamantly refused to testify at trial, despite the fact that the court ordered him to answer questions put to him no less than eight times. (Tr. 6/15/99, pp. 92-94). He was already in an orange jail suit on a probation/parole hold, so the threat of incarceration would have had little impact on him. He indicated quite decisively that he felt everyone was out to hurt him and that he was *not* going to testify. (Id. at 95). The man was clearly a hostile witness, and any further attempt to make him answer the questions would have been futile.

Defendant's motion for a new trial is denied on both bases.

The defendant also contends that trial counsel was ineffective for failing to object to Jury Instruction 990 (use of a dangerous weapon), which was utilized at trial. He maintains that counsel acquiesced to this instruction which essentially "directed the verdict on [an] element against the defendant" and relieved the State from its burden of having to prove that a baseball bat was a dangerous weapon. (*Motion, p. 18*). The court read the instruction as follows:

> The Information not only alleges that the defendant committed the crime of first degree reckless homicide, but also did so while using or threatening to use or possessing a dangerous weapon.
>
> If you find the defendant guilty, you must answer the following question. Did the defendant commit the crime of first degree reckless homicide while using, threatening to use or possessing a dangerous weapon.

> Before you may answer the question yes, you must be satisfied beyond a reasonable doubt that the defendant committed the crime while using, threatening to use or possessing a dangerous weapon and possessed the dangerous weapon to facilitate the crime.
>
> Dangerous weapon means a baseball bat. . . .

(Tr. 6/16/99, p. 64).

A sidebar was called and the State indicated that it was an oversight that "dangerous weapon" was defined in the instruction, and that the jury should really determine whether or not a baseball bat was a dangerous weapon based on the facts of this case. (Id. at 67). The defense indicated it wanted the instruction left the way the court had read it. (Id. at 68). After affirmation of this position by the defendant himself, the parties then proceeded to closing arguments. (Id. at 68-69). The issue is deemed waived. The defendant did not want it read the other way. Even if the issue is not deemed waived, counsel cannot be termed ineffective. Although he did not raise the issue, the State raised the issue; and thus, the issue was ultimately addressed by both parties. The defense indicated it wanted the reading to stand. In any event, there is not a reasonable probability that the jurors would not have found the baseball bat in this case not to be a dangerous weapon. Under Strickland, there is no prejudice to the defendant.

Finally, the defendant asserts that the court improperly denied his motion to suppress evidence. Based on the transcript of the suppression motion, this portion of the defendant's postconviction motion is denied for the same reasons set forth by the court in denying the motion. (Tr. 6/15/99, pp. 17-19).

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (new trial) is **DENIED.**

Dated this 31st day of October, 2000, at Milwaukee, Wisconsin.

BY THE COURT:

MILWAUKEE CO. WISCONSIN

Jeffrey Wagner
Circuit Court Judge

permission to allow entry into home, whether minor had key to the home, and whether minor shared certain household duties with parent. U.S.C.A. Const. Amend. 4.

7. Arrest ⇐68.5(7)

Where police officer who effected warrantless entry into home did not conduct inquiry or elicit any facts upon which he could reasonably have determined that minor answering the door had common authority over the house, officer acted unreasonably and his entry was without valid third-party consent. U.S.C.A. Const. Amend. 4.

8. Criminal Law ⇐1169.2(5)

Assuming that warrantless entry into defendant's home could not be justified by exigent circumstances and that his subsequent consent to search his house was tainted by illegal arrest, sexual assault convictions would be upheld because admission of evidence was harmless error; verdict was strongly supported by victim's in-court identification of defendant and codefendant as her attackers, medical testimony that corroborated her testimony about her injuries, and expert testimony that tied semen found in victim's vagina to defendant and codefendant.

Wm. J. Sheppard, Elizabeth L. White and Michael R. Yokan of Sheppard and White, P.A., Jacksonville, for petitioner.

Robert A. Butterworth, Atty. Gen. and Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for respondent.

HARDING, Justice.

We have for review *Saavedra v. State*, 576 So.2d 953 (Fla. 1st DCA 1991), based on conflict with *Padron v. State*, 328 So.2d 216 (Fla. 4th DCA), *cert. denied*, 339 So.2d 1172 (Fla.1976).[1]

[1-3] The issue for review is whether a minor may consent to a police officer's warrantless entry into a parent's home. We hold that a minor may provide valid third-party consent to a warrantless entry if the State can show: 1) the minor shares the home with an absent, nonconsenting parent;[2] 2) the police officer conducting the entry into the home *reasonably* believes, based on articulable facts, that the minor shares common authority with the parent to allow entry into the home;[3] and 3) by clear and convincing evidence that the minor's consent was freely and voluntarily given under the totality of the circumstances.

The State charged Tommy Saavedra (Saavedra) and Donald Teater (Teater), with burglary, armed kidnapping, and three counts of sexual battery which occurred when they broke into their next-door neighbor's home, forcibly removed a twelve-year-old girl and repeatedly assaulted her in a nearby park.

K.A., the victim, testified that on the evening of June 24, 1987, at approximately 10:30 p.m., there was a power failure in the neighborhood and that she and her sister sat on their front porch. Next door, K.A. saw her brother and cousin speaking to Saavedra, Teater, Tommy Saavedra, Jr. and his cousin Robbie Methvin. When the power was restored, K.A. went next door and got her brother and cousin, returned home, and shortly thereafter went to bed. At

1. Jurisdiction is based on article V, section 3(b)(3) of the Florida Constitution.

2. In *United States v. Matlock*, 415 U.S. 164, 170, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974), the United States Supreme Court stated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." A parent is considered absent if at the time and place the police officer asks the minor for entry into the home, the parent is not physically present with the minor.

3. We note that the initial entry into the home would indicate that the officer may be admitted into any of the common-living areas of the house where a caller might normally be admitted. However, before the officer may be admitted into other areas of the house, the officer must have the reasonable belief that the child shares common authority over those areas with the parent as well. This reasonable belief also must be supported by some articulable basis for the third-party consent to be valid.

approximately 2:00 a.m., K.A. stated that she was awakened by a sharp object sticking in her side. She saw Saavedra, who was kneeling beside her bed dressed in a black karate suit, and another man, who was also dressed in a black suit and hood, standing behind him. Saavedra threatened to kill K.A. if she made any noise. As the men forced her outside, the hood fell off the other man and K.A. recognized him as Teater.

Saavedra and Teater led the victim to a nearby park, tore off her t-shirt and underwear, pushed her to the ground and forced her to have intercourse with each of them. The men then led her to a slide in the park and again forced her to have intercourse. Teater then unsuccessfully attempted anal intercourse. Finally, the men led her to a concrete circle in the middle of the park and forced her to have intercourse again. After these attacks, which lasted over an hour, Saavedra told K.A. that "the next-door neighbors can't help you now." Saavedra and Teater fled the park and left K.A. behind. K.A. then gathered her clothing, went home and told her brother about the attacks.

At approximately 3:30 a.m., the police arrived at K.A.'s house after receiving a report of a sexual battery. When K.A. identified her attackers as her next-door neighbors, Saavedra and Teater, Officer Robert Benfield went to Saavedra's home and knocked on the door. Two other officers began looking into the windows with their flashlights. One of the officers testified that he saw two persons lying in the bed, and thus he began to knock louder in order to arouse the occupants.

Officer Benfield testified that he went to the back door and began to knock. A young boy, later identified as Saavedra's fifteen-year-old son, answered the door. According to Officer Benfield, he identified himself and told the boy that he needed to speak to an adult. The boy then gave him permission to enter the home. Officer Benfield entered the home and walked past the boy to a nearby bedroom where he arrested Teater. Two other officers entered the home and arrested Saavedra in an adjacent bedroom. The officers then placed Saavedra and Teater in the back of the police car, and K.A. identified them as her attackers. The next morning the police obtained Saavedra's consent to search his home where they found two pairs of black pants, one of which was located in Saavedra's room, as well as a black hood. Both pants were soiled, and one was wet with sand.

The trial court denied Saavedra's motion to suppress the evidence obtained from his home after his warrantless arrest. The jury convicted him of burglary, armed kidnapping, and three counts of sexual battery. The First District Court of Appeal upheld the trial court's denial of Saavedra's motion to suppress as well as his three convictions for sexual battery. *Saavedra*, 576 So.2d at 963. In affirming the trial court, the district court held that a minor could grant valid consent to enter a home and concluded that under the totality of the circumstances Saavedra's son granted valid consent. *Id.* at 959. In reaching its decision, the district court rejected the Fourth District Court of Appeal's holding in *Padron*, 328 So.2d at 217 In *Padron*, the Fourth District Court of Appeal made a per se rule that a minor did not share common authority with a parent over the home, and thus the minor could not grant valid consent for the police officers to enter the home.[4] 328 So.2d at 217.

[4] In *Padron v. State*, 328 So.2d 216 (Fla. 4th DCA), *cert. denied*, 339 So.2d 1172 (Fla.1976), the police arrested a defendant at his home for homicide and placed him in the back of the police car. The defendant refused to give the police permission to search his home. An officer then asked the defendant's sixteen-year-old son for permission, but the son also denied the police entry. The officers then ordered all persons out of the home, including the defendant's fifteen-year-old son, who was ill. At that point, the sixteen-year-old son acquiesced and allowed the entry and search of the home. The Fourth District Court of Appeal held that a minor did not share common authority over the home with a parent, and thus could not grant valid consent to search the home. Furthermore, the court stated that even if the minor did share common authority with the father, the minor could not grant consent where the father was present and had asserted his rights. *Id.* at 218. In addition, the court also found that, under the circumstances of the case, the son's consent was

Saavedra raises two issues for our review: 1) whether the trial court erred in denying his motion to suppress evidence obtained following the police officer's warrantless entry into his home and arrest; and 2) whether the trial court properly convicted him of three separate charges of sexual battery.

[4] The first issue we address is the police officer's warrantless entry into Saavedra's home and his subsequent arrest. In *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the United States Supreme Court held "that the Fourth Amendment ... prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Id.* at 576, 100 S.Ct. at 1374–75 (citations omitted). As the Court stated:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ... houses ... shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 683, 5 L.Ed.2d 734. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Id. at 589–90, 100 S.Ct. at 1381–82. Thus, the rule of law is that absent consent or exigent circumstances, the police may not make a warrantless entry into a suspect's home in order to make a felony arrest.

[5] The issue here is whether a minor may grant consent for a police officer to enter a home that the minor shares with a parent.[5] We hold that the State must show by clear and convincing evidence from the totality of the circumstances that the minor gave free and voluntary consent.[6] Cf. *Newman v. State*, 379 So.2d 643 (Fla.1980). In addition, because the minor shares the home with a parent, the consent must satisfy the third-party-consent test. This Court has stated that "[t]he test for a valid third-party consent to a warrantless search is whether the third party has joint control of the premises." *Ferguson v. State*, 417 So.2d 631, 634 (Fla.1982). Furthermore, a joint occupant or one sharing dominion and control over the premises may provide valid consent only if the party who is the target of the search is not present or if the party is present and not does not object to the search. *Silva v. State*, 344 So.2d 560, 562 (Fla.1977). In cases of third-party consent, the United States Supreme Court has stated:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but

Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990) ("The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects.").

not freely and voluntarily given. *Id.* The First District Court's decision in *Saavedra* only conflicts with the per se rule in *Padron*. Thus, this Court is only addressing the narrow issue of whether a minor shares common authority with a parent over the home to allow a police officer entry.

5. Although the issue in this case is entry into a home to make a warrantless arrest, rather than to conduct a warrantless search, the United States Supreme Court does not distinguish between the two in determining reasonableness under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 589–90, 100 S.Ct. 1371, 1381–82, 63 L.Ed.2d 639 (1980); *see also Illinois v.*

6. In *Denehy v. State*, 400 So.2d 1216, 1217 (Fla. 1981), we held that "[u]nder ordinary circumstances the voluntariness of the consent to search must be established by preponderance of the evidence." Because the issue in the instant case addresses the question of a minor granting consent to enter a parent's home, we find that the higher standard of clear and convincing evidence is appropriate.

> may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). The Supreme Court then explained in a footnote that:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in *his own right* and that the others have *assumed the risk* that one of their number might permit the common area to be searched.

Id. at 171 n. 7, 94 S.Ct. at 993 n. 7 (emphasis added) (citations omitted).

The validity of the minor's consent hinges on the determination of whether it is reasonable to recognize that a minor may permit, in his or her own right, a police officer's entry into the home. The only Florida case to address this issue is *Padron*, which adopted a per se rule that minors do not share common authority with parents over the home, and thus cannot consent to an entry. Other states which have addressed this issue have declined to follow the holding in *Padron*, and have instead applied a case-by-case approach to determine the scope of a minor's common authority to consent and whether the consent was knowing and voluntary. *See Doyle v. State*, 633 P.2d 306, 307–308 (Alaska App.Ct.1981) (holding that the general rules which apply to all warrantless search cases apply in determining whether a minor gave valid consent); *Atkins v. State*, 173 Ga.App. 9, 325 S.E.2d 388, 391 (1984) (holding the common authority test in *Matlock* applied in determining whether a minor may consent to entry into a home) *affirmed* 254 Ga. 641, 331 S.E.2d 597 (1985); *People v. Swansey*, 62 Ill.App.3d 1015, 20 Ill.Dec. 211, 214, 379 N.E.2d 1279, 1282 (1978) (holding that the minor shared common authority because "where two people have an equal right to the use or occupancy of a home, either may consent to a search of that home"); *State v. Folkens*, 281 N.W.2d 1, 4 (Iowa 1979) (holding that a fourteen-year-old had common authority over the home to allow a search in her own right); *In re Anthony F.*, 293 Md. 146, 442 A.2d 975, 978 (1982) (holding that the record supported the trial judge's determination that a minor who appeared to be thirteen years old "possessed sufficient authority to allow the officers to enter the living room of the home"); *State v. Scott*, 82 Or.App. 645, 729 P.2d 585, 588 (1986) (holding that the common authority test in *Matlock* applied in Oregon; thus the court reversed and remanded the case to determine the scope of the minor's consent to allow entry into the home); *but see Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46, 55 (1978) (holding that sixteen-year-old minor did not have dominion over the home equal to the parent because the parent had the power to determine the extent of the minor's authority to admit people into the house); and *Hembree v. State*, 546 S.W.2d 235, 241 (Tenn.Crim.App.1976) (stating that the rights of an eighteen-year-old son to use or occupy the premises are not necessarily equal to the rights of use or occupation of his parents).

[6] Because this Court must decide search and seizure cases in conformity with the Fourth Amendment "as interpreted by the United States Supreme Court," we adopt the common authority test set out in *Matlock* for determining whether a minor may grant consent to allow a police officer entry into the parent's home.[7] In applying the *Matlock* test, Florida courts should focus on whether the police officer had a *reasonable* belief based on articulable facts that the minor shared joint authority over

7. Art. I, § 12, Fla. Const.

the home with the parent.[8] In determining the reasonableness of the police officer's belief, the courts should consider the minor's age, maturity, and intelligence. The courts should also consider any other facts which might show that a police officer reasonably believed that a minor shared joint authority over the home, such as whether the minor had permission to allow entry into the home, whether the minor had a key to the home, and whether the minor shared common household duties with the parent. Certainly, it would be unreasonable to suggest that a child of tender years shared common authority with the parent over entry into a home. *See Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278, 282 (1978) (holding that the state did not show that defendant's five-year-old son possessed the capacity, the intelligence, or the authority to give constitutionally effective consent). Moreover, in determining the scope of the minor's common authority we have held that third-party consent "cases have generally been decided on the basis of the individual's reasonable expectation of privacy in the area, whether others generally had access to the area, and/or whether the objects searched were the personal effects of the individual unavailable to consent." *Silva*, 344 So.2d at 563.

[7] At the suppression hearing before the trial court below, Officer Benfield testified about his actions in entering the house:

ASSISTANT STATE ATTORNEY: Okay. What did you do specifically?

OFFICER BENFIELD: I went to the rear door and knocked on it.

ASSISTANT STATE ATTORNEY: Okay. Did anything happen?

OFFICER BENFIELD: Yes, ma'am. A young white male answered the door.

ASSISTANT STATE ATTORNEY: Okay. Did you get the identity of that person who answered the door?

OFFICER BENFIELD: No, ma'am.

ASSISTANT STATE ATTORNEY: Can you describe what the approximate age was of this young white male?

OFFICER BENFIELD: Age is probably between about 12 to 13, somewhere in that area.

ASSISTANT STATE ATTORNEY: Okay. Did you say anything to him?

OFFICER BENFIELD: I informed him that I was Officer Benfield with the sheriff['s] office, was there to—and I needed to speak to an adult inside the residence. And if I may come in and he said, yes, and he opened the door and I went inside.

ASSISTANT STATE ATTORNEY: Okay. Was anyone with him when he opened the door?

OFFICER BENFIELD: No ma'am.

ASSISTANT STATE ATTORNEY: He was alone?

OFFICER BENFIELD: Yes, ma'am.

. . . .

ASSISTANT STATE ATTORNEY: Did anyone else come out at the time that you were at the door with this young man?

OFFICER BENFIELD: No.

ASSISTANT STATE ATTORNEY: Other than him saying come in, did you have any other conversation with him there at the door?

OFFICER BENFIELD: No ma'am.

ASSISTANT STATE ATTORNEY: Did he identify for you who was inside the premises?

OFFICER BENFIELD: No ma'am, he didn't say.

8. In determining whether the minor gave valid consent, the inquiry must focus on the reasonableness of the police officer's belief. In *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), the United States Supreme Court stated that the

> determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment ... 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.

Id. at 188, 110 S.Ct. at 2801. (citation omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)).

ASSISTANT STATE ATTORNEY: Okay. Did you ask him was there any one else at home?

OFFICER BENFIELD: I asked him if there were any adults and he said, yes, there were.

ASSISTANT STATE ATTORNEY: When you walked inside and walked towards the bedroom, what did this young boy do?

OFFICER BENFIELD: I have no idea. He was behind me and I didn't see where he went from there.

ASSISTANT STATE ATTORNEY: Did you have any further contact with this young boy?

OFFICER BENFIELD: No.

Officer Benfield also gave the following testimony on cross-examination by the defense attorney:

DEFENSE ATTORNEY: And did you ever ask the young man who he was or what connection he had with the premises?

OFFICER BENFIELD: No, ma'am.

DEFENSE ATTORNEY: And the young man did not lead you through the house after you obtained entry by stepping across the threshold, isn't that true?

OFFICER BENFIELD: He did not lead me in, no, ma'am.

DEFENSE ATTORNEY: After you entered the door and after you stepped over the threshold after the young man opened the door, you in essence were on your own in the house, isn't that right?

OFFICER BENFIELD: That's fair to say.

Officer Benfield's testimony shows that he did not conduct an inquiry or elicit any facts upon which he could have reasonably determined that the boy answering the door had common authority over the house. Thus, we find that Officer Benfield acted unreasonably and that the entry was without valid third-party consent. Because we find that the third-party consent was invalid, we do not reach the issue of whether the State showed by clear and convincing evidence that Saavedra's son gave free and voluntary consent under the totality of the circumstances.

[8] Normally, the next question we would address is whether the officers entered Saavedra's house based on exigent circumstances. However, we find that we do not need to reach this issue in order to resolve the instant case. Assuming arguendo that Saavedra is correct that the entry was absent exigent circumstances and that his subsequent consent to the search of his house was tainted by an illegal arrest, we find that the convictions should be upheld because the admission of the evidence was harmless error.

In *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986), this Court stated:

> The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135 (citation omitted). After closely reviewing the record, we find that the State has proved beyond a reasonable doubt that the error in the instant case did not contribute to the verdict. The verdict was strongly supported by K.A.'s in-court identification of both Saavedra and Teater as her attackers, the medical testimony that corroborated K.A.'s testimony about her injuries, and the expert testimony that tied semen found in the victim's vagina to Saavedra and Teater. Thus, even if the trial court erred in admitting evidence obtained following an illegal arrest, we find the error to be harmless.

Saavedra's final issue is whether the trial court erred in convicting him for three counts of sexual battery arising from one criminal episode. We find that the district

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which BARKETT, C.J., and
., concur.

ARKETT, Chief Justice, concurring specially.

I write to express additional reasons why the evidence should have been suppressed by the trial court and to underscore the majority's concerns regarding whether minors are capable of understanding and waiving their own rights, let alone those of their parents.

The majority correctly concludes that the invalid consent of fifteen-year-old Tommy Saavedra Jr. rendered the arrest unlawful. As a result of that unlawful police action, the trial court was obliged to suppress the victim's out-of-court identification made while Petitioner sat in a police car outside the Saavedra home moments after his arrest, and the wet black pants and hood found in a separate consent search the next morning.[10] Although this evidence certainly was damning, the State presented a strong case with properly admitted evidence, including the victim's testimony; her in-court identification of Petitioner; corroborative medical and expert testimony that was fully consistent with the victim's account; and other physical evidence.[11] On the totality of this record, I am convinced beyond a reasonable doubt that the jury would have reached the same result even without the inadmissible evidence.

The consent question in this case involves discrete but oftimes overlapping issues.[12] Under Florida law, the State must

9. Although we reject the district court's holding in *Padron* that a minor does not share a common authority with a parent in a home, we agree with the district court that it would be unreasonable for a police officer to believe that where a parent is present and asserting his or her rights, the minor has authority to override that assertion. As we have held:

> It is only reasonable that the person whose property is the object of a search should have controlling authority to refuse consent. His rights are personal to him and derive from the United States Constitution. Though a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another.

Silva v. State, 344 So.2d 559, 562 (1977) (citation omitted). Therefore, we disapprove *Padron* only to the extent that it is inconsistent with this opinion.

10. In *Norman v. State*, 379 So.2d 643, 647 (Fla. 1980), this Court held that when consent is obtained after an illegal arrest, "the unlawful police action presumptively taints and renders involuntary any consent to search," and the consent will be held voluntary only if there is "clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action." There is no evidence in this record to show that the State satisfied its burden to attenuate the taint between the illegal arrest and the subsequent consent made during interrogation the next morning. *Cf. Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (*Miranda* warning is insufficient to dissipate the taint of a confession made several hours subsequent to an illegal arrest).

11. For example, police discovered Saavedra's pry tool and screwdriver on the driveway next to the victim's home, both of which were introduced without objection. Evidence showed that the door of the victim's home may have been pried open, and the victim had been assaulted with a screwdriver during the criminal episode.

12. Proof that consent was given is a very different question from whether evidence supports a finding that consent, if given, was valid. *See, e.g., Alvarez v. State*, 515 So.2d 286, 288 (Fla. 4th DCA 1987) ("When consent to search is relied on as the justification, the state must not only prove that consent was given, but must also prove that such consent was freely and voluntarily given...."); *accord Laasch v. State*, 84 Wis.2d 587, 267 N.W.2d 278, 282 (1978) (distin-

prove by clear and convincing evidence that Tommy Saavedra Jr. actually consented to the warrantless home entry, and that his consent was voluntary, not the product of coercion. *Norman v. State*, 379 So.2d 643, 646 (Fla.1980) ("In Florida, the prosecution must show by clear and convincing evidence that the defendant freely and voluntarily consented to the search."); *Bailey v. State*, 319 So.2d 22, 27 (Fla.1975) (evidence of consent must be "clear and convincing").[13] Necessarily subsumed within the State's burden, as the majority notes, is that it must prove the consenting party had the authority to consent to the home entry and scope of police conduct at issue. Failure to establish these facts by clear and convincing evidence renders the consent invalid as a matter of Florida law. The majority writes only about this last issue. I believe the other consent issues require some comment.

With respect to proof of actual consent, the record shows direct conflict between the testimony of officers and youths at the scene. Saavedra and fourteen-year-old Robbie James Methvin testified that officers pushed their way into the home without seeking permission to enter. Both Officer Benfield and Sergeant Pease contradicted that testimony, saying that Saavedra openly agreed to allow them to enter after they separately sought his permission when he came to the door. Benfield also testified that had he been denied consent he would have to have obtained an arrest warrant, although he never once had obtained an arrest warrant in twelve years on the police force. A persuasive argument could be made that the State failed to prove actual consent on these facts, but the trial court acted within its discretion to find actual consent.

Having said the trial court acted within its discretion to find actual consent, the next inquiry is whether that consent was voluntary under the totality of the circumstances, a question the majority does not reach. *See* majority op. at 959. Uncontradicted evidence shows that young Saavedra was awakened at 3 a.m. by the loud banging of police on the windows and doors of the house and the glare of police flashlights shining out of the blackness of night through the windows. Saavedra saw police cars parked in the driveway when he looked outside. Saavedra then opened the rear door where Officer Benfield was banging. He saw the officer standing there in

guishing the requirement to prove that a five-year-old actually consented to a search, from the requirement that the state prove voluntariness of the consent); *see generally* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2 n. 7 (2d ed. 1987). The United States Supreme Court cases in this area have drawn this distinction in their analyses. For example, in *Stoner v. California*, 376 U.S. 483, 489, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964), the Court found clear and unambiguous proof that a hotel clerk had given police permission to search Stoner's room, but held the search invalid because the clerk had no right to consent to that search. *See also Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (with clear evidence of consent to enter the home, the Court focused on whether police reasonably believed that the person who gave consent had the authority to do so); *United States v. Matlock*, 415 U.S. 164, 177, 94 S.Ct. 988, 996, 39 L.Ed.2d 242 (1974) (focusing not on consent, which had been established, but on whether the person who gave consent had the authority to do so.) In *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), the Court again was faced with undisput-

search the home, but held the consent invalid because deputies effectively coerced the consent and the state therefore failed to prove that consent was freely and voluntarily given. *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (having clear proof that officers got permission to search the vehicle, the Court focused on whether that consent had been given voluntarily when there was no proof that the consenting party knew he had the right not to consent).

13. I agree with the majority that in cases where a minor is asked to give consent, or where law enforcement gets consent from any person after officers fail to comply with the law, Florida law requires the State to prove valid consent by clear and convincing evidence. Majority op. at 956 & n. 6. The Court's reliance on both *Denehy v. State*, 400 So.2d 1216, 1217 (Fla.1981), and *Norman v. State*, 379 So.2d 643 (Fla.1980), properly recognizes that the clear and convincing evidence burden must be applied at least "where the consent follows an illegal arrest, seizure, search, detention, or some other coercion." *State v. Fuksman*, 468 So.2d 1067, 1072 (Fla. 3d DCA 1985) (Pearson, J., concurring specially).

full uniform with his badge displayed, requesting entrance. Saavedra testified that he was scared and shaken up, and he immediately let the officer in.

What minor would have felt free to do otherwise? This was at least as coercive as the situation in *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), where the Court found that a consensual home entry had been coerced by the assertion of deputies that they had a search warrant. These facts are unrefuted and I would find them inherently coercive, presenting a situation, as Judge Barfield noted, where free and voluntary consent cannot be provided. *Saavedra v. State*, 576 So.2d 953, 964 (1st DCA 1991) (Barfield, J., dissenting). Accordingly, I would find that the State failed to prove voluntary consent under the totality of the circumstances.

The consent issue becomes quite complex when dealing with the police's reliance on the consent of a juvenile. In such cases courts face unique practical problems. Minors, especially children of tender years, are almost always going to consent to a police officer's request. Parents and teachers routinely teach children to distrust strangers, respect authority, and trust the police. As a result, children commonly acquiesce to a law enforcement officer's assertion of authority.

In many cases a child will lack "that degree of mental discretion necessary for a minor to give valid consent to the search of his, and his parents', home." *Davis v. State*, 262 Ga. 578, 422 S.E.2d 546, 550 (1992). Consequently, courts will be compelled to find that the "child simply did not know or completely understand what the consequences of his consent would be." *Id.*

Yet another troubling consequence of allowing juveniles to consent to police searches is the extent to which law enforcement may seek to rely on this rule. This decision must not be construed as an invitation to look for opportunities when officers know a juvenile is present in the home they wish to search without a warrant. The rule must be narrowly applied so as not to carve out a "juvenile's consent" exception to the Fourth Amendment warrant requirement.

I am compelled to conclude, as the majority does, that the burden on the State to prove voluntary authorized consent must be a heavy one and must be strictly adhered to. It follows that *some* minors are capable of exercising the kind of discretion necessary to consent to police action under certain circumstances. Cases cited in the majority's analysis, and other cases on the subject, correctly embody many criteria that officers and courts should consider in determining the validity of consent. Such factors include the youth's physical, mental, and emotional age, maturity, and intelligence; the child's understanding of the right to decline consent; the ability to understand the consequences of his or her actions; the child's right of access to the premises (such as guest or resident, permanent or temporary, recent or long-established, possession of or access to a key); whether the child commonly was left alone on the premises; the scope of access the youth shares with others (common areas such as kitchen and yard as opposed to more private areas such as bedrooms and bathrooms); the child's right of invitation (such as whether he or she has permission to invite friends into portions of the home at certain times of day); special instructions given to the child by others who share access to the property; the time of day and related circumstances under which officers seek access; representations officers make to the child when they seek consent; whether others who share access to the premises are present or reasonably available in order to vitiate the need to seek the minor's consent; and whether somebody with access had already declined to consent.

It must be remembered that consent is an *exception* to the constitutional *rule* that law enforcement officers must have a proper warrant to enter the home. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). If the validity of a child's consent is dubious and no exigent

circumstances exist, officers must get a warrant.

I also agree with the majority's sensitivity to children of tender years, see majority op. at 958, but I would draw a line at the age of thirteen under which no child can legally consent to allow police to conduct a warrantless home entry, search or seizure. The Legislature has drawn many lines to distinguish the capacity and rights of juveniles, and specifically has recognized that a child under the age of thirteen does not have the capacity to consent to confinement to negate the charges of kidnapping or false imprisonment if confinement is without a parent's consent. §§ 787.01(1)(b), 787.02(1)(b), Fla.Stat. (1991). The same public policy ought to apply here as well. I cannot believe that any child of such tender years would have sufficient capacity, maturity, intelligence, or authority to ever legally consent to a police entry, search, or seizure, thereby obviating the constitution's warrant requirement.

For the reasons expressed above, I concur with the majority's conclusion in this case.

KOGAN, Justice, concurring in result only.

I have no quarrel with the result reached here or the finding of harmless error. However, there is no need to adopt the test set out in *United States v. Matlock*, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974), because it is clear that this search fails under any construction of the law and facts. Moreover, I do not agree that article I, section 12 requires us to conform Florida law with *Matlock* or *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990). Those two cases dealt only with the question of whether *adults* can authorize the search of a home where those adults are, or purport to be, coinhabitants.

Both *Matlock* and *Rodriguez*, assume that adults usually possess the ability to give consent with respect to property they jointly inhabit with others. I do not believe we can make the same assumption for children. If anything, it is common for parents to deny their children any authority over the house and especially the authority to open the door for strangers—even if the strangers happen to be police officers. Accordingly, those opinions are distinguishable and do not constitute controlling law in the present case. Because we need not anticipate the United States Supreme Court's future actions here, I would not do so.

BARKETT, C.J., and SHAW, J., concur.

Michael Tyrone CRUMP, Appellant,

v.

STATE of Florida, Appellee.

No. 74230.

Supreme Court of Florida.

June 10, 1993.

Rehearing Denied Sept. 3, 1993.

Defendant was convicted of first-degree murder and was sentenced to death by the Circuit Court for Hillsborough County, M. Wm. Graybill, J., and he appealed. The Supreme Court held that: (1) evidence concerning defendant's commission of another murder was properly admitted to establish modus operandi identifying defendant as victim's murderer; (2) probative value of expert witness' testimony regarding his previous investigations of serial murders was not outweighed by any danger of unfair prejudice; (3) trial court properly excluded detective's statements regarding information that tended to show that another suspect may have killed victim; (4) probable cause existed to seize defendant's truck, supporting search under vehicle exception to warrant requirement; (5) competent, substantial evidence supported conclusion that defendant murdered

COUNTY OF MILWAUKEE
DISTRICT ATTORNEY'S OFFICE
INTER-OFFICE COMMUNICATION

March 18, 1999

File

From: William J. Molitor, Assistant District Attorney WJM

Re: State of Wisconsin v. John Tomlinson, Jr., Case No. 99CF001079, Historical and Chronological Summary of the Situation Involving Witness Otis Coleman

On March 2, 1999, while reviewing the above-captioned matter for charging purposes, I had requested to Detective Clint Harrison to see if he could bring Otis Coleman in for me to interview regarding his knowledge of the above situation. I and Detective Harrison spoke to Otis Coleman from about 11:30 a.m. to 12:10 p.m. in District Attorney's Homicide Unit conference room in room 618 of the Safety Building. Mr. Coleman primarily described what was in the previous police reports. He did add that after the black male, later identified as the defendant, did hit the victim whom he knew as "Little" and the victim threatened Otis as he attended to the victim that Otis walked away to the park playground past 13th Street and into the playground proper. Otis said about 2-3 minutes went by and he was about a block and a half away from the victim and he looked back and did not see the victim. He said as he was walking away from the victim, he initially looked back and saw the black male, later identified as the defendant and heretofore referred to as the defendant, who was wearing a hat walking away on the same side of the street (north) as the victim. On the next Monday following the incident, the victim's sister said she had not seen the victim. Otis was later advised that the victim was in the hospital and later learned that he died. Otis admitted he did not call the police and that he did not want to get involved in an incident that didn't involve him and also considering the fact that the victim, according to Otis, had been out-of-line regarding his comments to the black female calling her a bitch in reference to the cigarette incident. Otis said that both he and the victim had been drinking and were coming down. Otis described the same man who was with Rob the first time as the same man, a black male, the defendant, who returned and hit the victim with the bat. After having gone over this statement with Mr. Coleman, Detective Harrison advised me that Mr. Coleman was on probation and there was apparently a VOP hold. I was also advised that Mr. Coleman was also apparently a witness regarding a victim Deandre Flippin (I later learned that case number to be 98CF005691). Mr. Coleman indicated he was afraid that the guys in the Flippin case would get him if he was in jail. Detective Harrison indicated that he or Detective Kuchenreuther would call Mr. Coleman's probation officer to inquire about his status and try to work out something with the Probation Department without taking Mr. Coleman into custody if it was O.K. with the probation officer, but if not, Mr. Coleman was advised he would be taken into custody. Mr. Coleman also made reference to the diagram that he drew showing the position of the various persons during the incident.

I told Mr. Coleman I was making no promises to him regarding the situation with his probation officer and the police department and that I was not interceding

and advised him to only base everything on this case on the truth and not on any probation status.

The police had arranged for a line-up which was to take place on the evening hours of March 2, 1999.

On March 3, 1999, when I came into work in the morning, a message was left on my voice mail indicating that it was placed there at 9:14 p.m. on March 2, 1999, by Detective Clint Harrison advising me that Mr. Coleman had identified the defendant at the line-up. Detective Harrison also advised me that Otis Coleman was told he was going to be arrested on the VOP hold before the line-up occurred.

On March 11, 1999, at about 11:10-11:20 a.m. after the male deputy sheriff bailiff in preliminary hearing court said that Otis Coleman wanted to see me, I and Detective Clint Harrison went into the bullpen. Mr. Coleman was in an interview room in the preliminary hearing bullpen, at which time he mentioned that he was fearful for his safety being in custody and that there was a "keep separate" notation on his paperwork which apparently let others know that he was a snitch or testifying. Mr. Coleman was upset that we didn't intercede on his behalf with the probation officer. Detective Harrison told him that he had to arrest Mr. Coleman on the VOP hold after Detective Harrison spoke to his probation officer's supervisor. Detective Harrison could not reach Mr. Coleman's probation officer before the line-up but just the supervisor. Detective Harrison explained to the supervisor the situation and then spoke to Mr. Coleman's probation officer (Marliss Howe) the next day that Mr. Coleman was cooperating as a witness on a homicide case. However, the supervisor and/or Ms. Howe advised Harrison that Mr. Coleman had not been reporting and had to be taken into custody on the VOP hold. Detective Harrison and I then told Mr. Coleman we could not control the decision of the Probation Department and we could not promise him anything. I did tell Mr. Coleman that I did call the Criminal Justice Facility to put/ask for a "keep separate" notation on his card and to be kept separate from the defendant John Tomlinson for Mr. Coleman's own safety. Mr. Coleman said that he was a witness on another case as well (see the above Deandre Flippin case handled by Assistant District Attorney Griffin, which is also a homicide case) and that Mr. Coleman was fearful and felt we should be able to help him since he had information regarding homicide cases. Mr. Coleman thought we did not care about him or his safety. I then told Mr. Coleman he had to do what he had to do and at which time Detective Harrison and I then left.

The case was then called for preliminary examination and several witnesses were called and then the State called Otis Coleman as a witness. When Mr. Coleman got on the witness stand, he basically indicated that he was incarcerated and was in danger and wanted a lawyer present on his behalf. Judicial Court Commissioner Audrey Brooks then adjourned the matter and subsequently requested Attorney Robert Sherry, who was in court, to inquire of Mr. Coleman what the problem was. The matter was then put off until 1:30 p.m.

After the lunch break, Attorney Robert Sherry told me that Mr. Coleman would testify in this case if the VOP hold was dropped. Mr. Sherry indicated he would represent Mr. Coleman in this matter. After calling another witness (Officer Waukau), the preliminary hearing was adjourned until March 16, 1999, at 1:30 p.m.

After the preliminary hearing was adjourned, Detective Clint Harrison gave me the telephone number of Marliss Howe (265-7760) and her supervisor, Jeff Radcliff.

On March 12, 1999, at 8:28 a.m., I called the Probation and Parole Officer Marliss Howe, and I was advised that she would be out until Monday, March 15, 1999, as would her supervisor, Mr. Radcliff. I was advised that Rosemary Cleveland was Marliss Howe's cover agent. Ms. Cleveland was not in, so I left a message on her voice mail.

On March 12, 1999, at 10:20 a.m., there was a call on my voice mail from Leanne Mittelstadt, Probation and Parole Department, 265-7771, regarding Otis Coleman. I then contacted her and explained the situation to her, meaning that Otis Coleman was a key witness in the homicide case and would not testify because he feared for his personal safety while incarcerated on their VOP hold and requested if there was any possibility that Probation and Parole Division, Department of Corrections, would be willing to release Mr. Coleman from actual physical incarceration in the jail/prison-type facility. Ms. Mittelstadt indicated that she would get back to me in the afternoon and that she had to talk to her supervisor about the situation.

On March 12, 1999, I took my voice mail messages in the afternoon and discovered that Ms. Mittelstadt had called me at 1:55 p.m. leaving a message that she had spoken about the Coleman matter with her supervisor, but that is not the supervisor for Marliss Howe and that she would be in on March 15, 1999, at about 7:45 a.m. in the morning. She indicated it could be possible that Mr. Coleman would be released early the following week and put on the bracelet.

On March 15, 1999, in the morning hours, I spoke to Supervisor Jeff Radcliff (telephone number 265-7767) about the above-stated matter. Mr. Radcliff indicated that while Mr. Coleman was at the Racine Correctional Institution on the VOP hold that he could be released that all he needed was a place for Mr. Coleman to stay with a telephone and that if this was the case that Mr. Coleman would be put on electronic monitoring awaiting inpatient or outpatient drug treatment as an alternative to revocation and that if such a program would be an alternative to revocation. Mr. Radcliff stated that if Mr. Coleman was transported back to the Racine Correctional Institution after the preliminary examination on March 16, 1999, assuming Mr. Coleman was willing to abide by the program and testify truthfully that Mr. Coleman could be released on the electronic monitoring on March 17th at the earliest or March 18th at the latest.

March 18, 1999

On March 15, 1999, at 11:15-11:20 a.m., I contacted Attorney Robert Sherry (272-7803) and advised him of my conversation with Mr. Radcliff and that Mr. Sherry said that he would call Mr. Radcliff to confirm the wishes of the Probation and Parole Department and to confirm the fact that Mr. Coleman had a place to stay with a telephone for electronic monitoring purposes awaiting in or outpatient drug treatment as an alternative to revocation. Mr. Sherry said he was willing to see Mr. Coleman on the morning of March 16, 1999.

On March 16, 1999, I spoke to Robert Sherry at about 11:35-11:45 a.m., at which time Mr. Sherry indicated he spoke to Mr. Coleman and explained that the Probation Department would as an alternative to revocation place Mr. Coleman on electronic monitoring as long as he had a home and a phone therein awaiting inpatient or outpatient drug treatment and that he would be released as an alternative to revocation (assuming he testified truthfully) at the earliest Wednesday, March 17, and no later than March 18, 1999, and that Mr. Coleman had to be returned to the Racine Correctional Institution to be processed out. Mr. Sherry advised me that Mr. Coleman did have a place to stay and a phone but did not want that information placed on the record. Mr. Sherry indicated Mr. Coleman had a fear of physical harm while incarcerated if word got out that he testified against someone else.

On March 16, 1999, at 1:20 p.m., I spoke with Jeff Radcliff who confirmed that Robert Sherry called him on March 16, 1999, and verified the agreement as the alternative to revocation but that he wanted Mr. Sherry to advise him as to where Mr. Coleman would be staying and his telephone number.

Also, when I was speaking to Mr. Sherry between 11:35-11:45 a.m. on March 16, 1999, Mr. Sherry said that Mr. Coleman would testify truthfully at the preliminary hearing. Mr. Sherry also indicated he had no objection with me talking to Otis Coleman about this case (referring to the Lewis Phillips homicide). Mr. Sherry and I tried to get Mr. Radcliff on the phone at that time with a three-way call, but the line was busy and we agreed that if Mr. Sherry did not reach Mr. Radcliff before the preliminary hearing time at 1:30 p.m., I would call Mr. Radcliff to advise that Mr. Coleman would accept the alternative to revocation.

On March 16, 1999, prior to the commencement of the preliminary examination at 1:30 p.m., Mr. Sherry advised me that Otis Coleman would be staying at [redacted] with telephone number [redacted] I advised Mr. Sherry that based upon Mr. Coleman's fears for his safety during his cooperation and testifying that I would move the trial court for a protective order and would give that information to the defense attorney with an order that it not be given to the defendant.

On March 16, 1999, at about 1:50 p.m., after Mr. Sherry went back into the bullpen to talk to Mr. Coleman with apparently to obtain the information regarding his address and phone number, Mr. Sherry told me that he had gone over the alternative to revocation program as outlined and that for a while Mr. Coleman hemmed and hawed about not getting out of custody on March 16, 1999.

on that day because he was afraid of retaliation if he testified. Mr. Sherry stated that he told Mr. Coleman that if he didn't testify, he would not get out of custody until the Probation Department was done with him. Mr. Sherry advised me Mr. Coleman did agree to testify truthfully.

On March 16, 1999, Mr. Coleman was called at the continued preliminary examination and did testify.

On March 16, 1999, at 2:52 p.m., I called Supervisor Jeff Radcliff to advise him of the fact that Otis Coleman did testify consistent with his previous statements to the police and to advise Mr. Radcliff of Otis Coleman's address and phone number. Mr. Radcliff was not in his office but I left a message on his voice mail.

On March 17, 1999, at 9:35 a.m., I called Mr. Radcliff to make sure that he got my message from the day before, but he was not in and left a message on his voice mail to call me. At 9:40 a.m. on March 17, 1999, Mr. Radcliff called me back and I advised him of the information again, and he indicated that Mr. Coleman would be in their office on March 18, 1999, after his return/release from the Racine Correctional Institution. I advised Mr. Radcliff of the May 17, 1999, jury trial date in Judge Flanagan's court.

That was the extent of my contacts with Mr. Coleman, and there were no other threats, promises or inducements made to Mr. Coleman directly or indirectly other than what is set forth above in return for his truthful testimony at the preliminary examination except for having our process service, with the permission of Mr. Sherry, serve Mr. Coleman with subpoenas for the jury trial in this case and the Flippin matter while Mr. Coleman was in the CJF on March 17, 1999.

WJMiks

with the District Attorney conditions that would meet Mr. Coleman's concerns, and I'm not sure that we've come to any meeting of the minds.

THE COURT: All right.

MR. MOLITOR: I guess the witness should be sworn, Judge.

OTIS COLEMAN, being first duly sworn on oath to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE COURT: Okay. You want to state your name for the record.

THE WITNESS: Otis Coleman.

THE COURT: And, Mr. Molitor.

DIRECT EXAMINATION BY MR. MOLITOR:

Q Mr. Coleman, are you willing to answer questions regarding your knowledge of the homicide of Lewis Phillips, also known as Little?

A I would -- any questions asked here today, I would have to invoke my Fifth Amendment rights. It might tend to incriminate me. I don't care to do any talking about anything. I don't think that I'm mentally stable enough at the present time to answer any questions about anything.

Q And why are you not mentally stable?

A Stressed. Stressed by your finalgating (sic). By his

finalgating and everything, I plead the Fifth.

THE COURT: Just listen to the question --

THE WITNESS: What is the question?

THE COURT: -- and just answer it.

Q Are you willing to answer any questions at all regarding your knowledge of the homicide --

A No.

Q -- of February 5 of 1999 to February --

A I must invoke the Fifth.

Q Let me ask the question. From February 5 of 1999 to February 6th of 1999 at or about 1134 West Chambers Street, here in the City and County of Milwaukee, State of Wisconsin, the topic on which you testified at the preliminary hearing in this case?

A I must invoke my Fifth Amendment rights.

Q What do you mean you're invoking your Fifth Amendment rights?

A I do not wish to say anything that might tend to incriminate me or to get me harmed in any way, shape or fashion.

Q Or get you what?

A Or harmed by you, the Court, anybody.

Q Is it my understanding you're to invoke your Fifth Amendment privilege regarding any questions asked of you about the topic I just brought up?

A About anything.

Q About the death of --

A About anything. I invoke my Fifth Amendment rights about anything you have to ask me.

Q Concerning the --

A About anything.

Q -- death of Lewis Phillips. Is that correct?

A Anything you have to ask me I invoke my Fifth Amendment rights.

MR. MOLITOR: Judge, I guess I'd ask the Court to order Mr. Coleman to answer some questions of mine. It may --

THE COURT: The Court's going to order you to answer some --

THE WITNESS: Can I invoke my Fifth Amendment? The Court can violate my Fifth Amendment rights if the Court can make me --

THE COURT: The Court's going to order you to, sir, answer those questions by the State.

MR. JENSEN: May I just have a minute.

(Whereupon an off-the-record discussion was had.)

THE COURT: Well, why don't you ask the question first before I order him to.

MR. MOLITOR: That's what I mean, I want

to --

THE COURT: All right.

(Whereupon, an off-the-record discussion was had.)

THE COURT: So, sir, the Court -- he's going to ask you a question. The Court's going to order you to answer it. So ask it -- so answer -- so ask the question.

Q Are you fearful of retaliation for being known as a snitch if you cooperate in this case?

A I invoke my Fifth Amendment rights.

THE COURT: And the Court's going to order you to answer that question, sir.

THE WITNESS: Beg your pardon?

THE COURT: The Court's going to order you to answer that question.

THE WITNESS: The Court's not ordering me to answer that?

THE COURT: Yeah, the Court's ordering you to answer that question.

THE WITNESS: I don't understand.

THE COURT: The Court orders you to answer the question.

THE WITNESS: I understand that, but I'm not understanding my rights here.

MR. JENSEN: Here, let me talk to him.

(Whereupon an off-the-record discussion was had.)

A In part.

Q I'm sorry?

A In part.

THE COURT: So are you answering the question then?

THE WITNESS: I just answered.

THE COURT: That's your answer to the question?

THE WITNESS: Yes.

Q And you're again refusing to answer any questions about your knowledge of who murdered Lewis Phillips on February 5 and February 6 of 1999. Is that correct?

THE COURT: You have to answer that.

A I invoke my Fifth Amendment rights.

THE COURT: You have to answer the question, sir.

A In part. What aren't you understanding?

Q What parts can you talk about, sir?

A Nothing I can think of.

Q Did you know Lewis Little?

A Yes.

Q And were you with him on February 6th at 1134 West

Chambers Street in that vicinity on February 6th?

A I invoke my Fifth Amendment rights.

Q Who did you see, if anyone, strike Lewis Phillips with a bat on February 5 to February 6 of 1999?

A I invoke my Fifth Amendment rights.

MR. MOLITOR: I have nothing further, Judge.

MR. JOHNSON: I've got a couple.

THE WITNESS: Do I have to be drug back down here for anything that you people need, because I feel that I -- I don't like coming down here. I asked you not to bring me down here. I don't want you bringing me back down here.

THE COURT: Go ahead.

MR. JOHNSON: Thank you.

CROSS EXAMINATION BY MR. JOHNSON:

Q You mentioned a few minutes ago that you were afraid the Judge might hurt you if you testify. Is that true?

A I'm not understanding the question -- oh, the Judge?

Q Yes.

A The Judge, you, the plaintiff's family, everybody. I'm scared everybody is going to hurt me. They are. I'm all messed up with what you're doing here. I don't know.

Q Well, did you tell the truth?

A You made me feel like I killed somebody.

Q Pardon?

A You made me feel like I killed somebody or something.
Q Did you?
A Have I ever -- I invoke my Fifth Amendment. Have I ever? No. I invoke my Fifth Amendment rights.
Q Did you testify truthfully under oath at the preliminary hearing in this matter?
THE COURT: Just a second. That young man can leave the courtroom. Go ahead.
MR. JOHNSON: Thank you.
Q Did you testify truthfully under oath in this matter at the preliminary hearing?
A I invoke my Fifth Amendment rights. Are you making the question so I invoke my Fifth Amendment rights?
THE COURT: Is it the Court's understanding that you're not going to -- go ahead, Mr. Jensen, talk to him.
(Whereupon an off-the-record discussion was had.)
THE WITNESS: Yes, sir. Continue.
Q Did you testify truthfully under oath at the preliminary hearing in this matter?
A I invoke my Fifth Amendment rights.
MR. JOHNSON: That's all I have.
THE COURT: Anything else?
MR. MOLITOR: Nothing, Judge.

THE COURT: Thank you.

THE WITNESS: Do I have to come back down here ever again for this?

THE COURT: I don't know. We'll let you know, sir.

(The witness leaves the stand.)

THE COURT: Go ahead.

MR. MOLITOR: At this time I would ask the Court to find under 908.04(1) that Mr. Coleman under (a) is unavailable as a witness, and I submit (b) applies to some extent, but I believe that (a) was sufficient based on the witness' answers here claiming the Fifth Amendment privilege to all the questions.

THE COURT: Any response from the defense?

MR. JOHNSON: Yes. I ask that you find him in contempt. He was ordered to answer the questions. Because I don't think anybody here has seen any suitable basis to invoke the Fifth Amendment privilege. He denied -- or he disobeyed a court order, and I would ask that he be found in contempt and then brought back here first thing tomorrow morning to give him a chance to purge himself of that contempt finding by testifying. That would be my request first.

THE COURT: Do you want to respond, Mr. Molitor, Mr. Jensen?

STATE OF WISCONSIN

IN SUPREME COURT

No. 00-3134-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN TOMLINSON, JR.,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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IN SUPREME COURT

No. 00-3134-CR

STATE OF WISCONSIN,

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v.

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. Does a teenage child have the actual or apparent authority to permit the police to enter her home when the child identifies herself to the police, the police have information that the teen lives at the premises, and the teen's father is present and standing behind her and does not contest the child's authority to permit the police to enter their home?

The trial court did not address this issue because Tomlinson did not challenge the child's authority to

consent to the entry until the postconviction motion. The court of appeals held that there was sufficient evidence in the record to establish that the teenage girl had actual authority to consent to the entry. *State v. Tomlinson,* 2001 WI App 212, ¶16, 247 Wis. 2d 682, 635 N.W.2d 201.

2. Did the teen's actions constitute consent when, in response to the detective's request to come in, she left the door open, turned to walk into the kitchen, and allowed the police to enter and follow her into the kitchen towards Tomlinson who had been standing behind her in the entrance of the kitchen?

The trial court found that the child had consented to the entry through her actions. The court of appeals affirmed this factual finding

3. Did Otis Coleman's persistent refusal to testify at trial render him unavailable, thereby permitting the introduction of his prior testimony at the preliminary hearing?

The trial court ruled that Coleman's refusal to testify rendered him unavailable and that the preliminary hearing testimony was admissible. The court of appeals held that Coleman's preliminary hearing testimony met the requirements for admission under Wis. Stat. § 980.045, as well as under federal and state constitutional principles. *State v. Tomlinson,* 247 Wis. 2d 682, ¶¶22-33.

4. Is a trial court required to personally voir dire a defendant before accepting a stipulation to an element of the offense, when the defendant has the assistance of counsel and is not waiving his or her right to a jury trial on the stipulated issue?

The trial court relied on Tomlinson's request that he made personally and through counsel to maintain the instruction stipulating to the fact that a baseball bat is a dangerous weapon. The court of appeals held that Tomlinson had waived his right to challenge the jury

instruction. Furthermore, a more in-depth colloquy was not required because Tomlinson had not waived his right to a jury trial on the dangerous weapon issue; rather, he had conceded to an element and that element had been submitted to the jury. *State v. Tomlinson,* 247 Wis. 2d 682, ¶37.

POSITION ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, both oral argument and publication are appropriate.

ARGUMENT

I. THE POLICE LAWFULLY ENTERED TOMLINSON'S HOME AFTER HIS DAUGHTER, WITH TOMLINSON'S APPARENT APPROVAL, CONSENTED TO THE ENTRY.

A. Introduction and the Decisions Below.

The issue that Tomlinson presents for this court's review is "what proof must the state adduce at a suppression hearing to establish that the entry into the home was properly authorized, and that the minor, in fact, consented to entry." Tomlinson's brief at 1. Tomlinson contends that the state failed to prove at the suppression hearing that the minor who answered the door had the authority to consent to the police entry. Tomlinson's brief at 6.

It is not surprising that there was minimal proof of the child's authority to consent adduced at the suppression

hearing, since Tomlinson did not challenge the child's authority in the trial court either in his written motion (11) or in his argument during the suppression hearing (44:17). He raised the issue of authority to consent for the first time in his brief in support of his postconviction motion (33:4-6). Tomlinson's sole assertion during the suppression hearing was that the minor child never actually consented to the entry, not that she lacked the authority to grant consent.

Had Tomlinson mounted a timely challenge to the entry based on lack of authority, the prosecutor likely would have elicited additional information from the testifying officer as to the basis for his belief that the child had the authority to grant consent. Having failed to do so, Tomlinson should not now be heard to argue that important evidence must be suppressed because the record does not adequately show the actual nature and extent of the minor's authority to grant consent. *See State v. Huebner,* 2000 WI 59, 235 Wis. 2d 486, ¶¶10-11, 611 N.W.2d 727 (issues raised on appeal must be properly preserved in the circuit court to promote efficiency and fairness).

Because Tomlinson did not raise the authority issue at the suppression hearing, the trial court did not address the child's authority to consent to the entry in its decision. However, the court did find that the child's actions constituted consent. The trial court stated:

> The officers gained admission into the residence based upon the acknowledgment of the 16 year old who allowed them into the house after knocking on the door, telling her why they were there. And after knocking, the door opened, there's some words to the effect that – asking if they could come in, and then they just subsequently followed her after she walked away from the door, which by a reasonable person would – leaving the door open would assume or make reasonable inferences that someone was going to at least follow them in.

> The Court believes that the entry was certainly consensual based upon the totality of the circumstances and the inferences that certainly can be made from the testimony that the police officer gave.

(44:18.) The court of appeals affirmed this factual finding, stating:

> The record supports the trial court's finding that the teenage girl's response to the detective's request to enter--opening the door, walking into the house, and allowing the officers to follow her into the house--was sufficient to convey her consent.

Tomlinson, 247 Wis. 2d 682, ¶15.

With respect to whether the child had authority to consent to the entry, the court of appeals acknowledged that the issue was not fully and completely addressed "primarily because the 'authority to consent' was not raised until the postconviction motion." *Id.* at ¶16. "Nevertheless, [the court concluded] that there [was] sufficient information in the record to establish that the teenage girl had actual authority to consent to the entry." *Id.*

The court first found that the record strongly supported an inference that the youth who answered the door was one of Tomlinson's teenage daughters. *Id.* at ¶17. The court then considered the age of the child and the scope of the consent as the two determining factors in deciding whether Tomlinson's daughter had authority to consent to the entry. Although the record was not clear as to which of Tomlinson's daughters answered the door, the court held that both "girls are within the age where courts usually find that the child has acquired the discretion to admit persons on their own authority." *Id.* at ¶19. One of Tomlinson's daughters was fourteen and the other was fifteen. *Id.*

The scope of the search also weighed in favor of finding that Tomlinson's daughter had authority to consent

to the entry. "Here, the consent was access into a common area of the home, the front entranceway and the kitchen, as opposed to the entire residence, or what could arguably be considered more private areas." *Id* at ¶20.

Finally, the court of appeals found it was significant that Tomlinson was nearby when the police entered, yet he did not object to the entry. *Id.* Apparently, the daughter had Tomlinson's approval to permit the entry, since he did not contest her authority to admit the police.

B. Factual Background

On the second day of trial, the circuit court held a hearing on Tomlinson's motion to suppress evidence of the recovery of a baseball bat from his home (44). The State presented the testimony of Detective Dennis Kuchenreuther, a sixteen-year veteran of the Milwaukee Police Department (44:5). The defense called no witnesses (44:16). The facts adduced during the suppression hearing can be summarized as follows.

On the evening of February 27, 1999, Detective Kuchenreuther and several of his colleagues were investigating the February 5-6, 1999, homicide of Lewis Phillips, who died as a result of a blunt force trauma to the head (44:5-7). That evening, police had received information from Angela Green, a witness to certain events immediately after the homicide (44:5-6). Ms. Green informed police that, in the late evening of February 5 or early morning of February 6, she had been walking westbound in the 1100 block of West Chambers Street when she heard a woman yell "kick the bitch in the head" (44:6). As Ms. Green continued to walk in that direction, she observed a person she recognized as "John" or "Red" walking toward her and carrying a baseball bat, along with two girls she recognized as his daughters carrying broom and mop handles (44:6). After Ms. Green passed them on the street, she came upon a person in the

area of 1134 West Chambers who was bleeding from his head (44:6-7).

When Green talked to police on February 27, she provided a description of all four individuals and identified the woman who yelled "kick the bitch in the head" as John or Red's wife (44:8). Green also identified a photograph of the defendant, John Tomlinson, from a photo array as the man she knew as Red or John (44:8). Green stated that Tomlinson, his wife, and their two daughters all lived at 2948 North 11th Street and she pointed out the house for the officers (44:6, 8).

At approximately 8:50 p.m., after speaking with Ms. Green, Detective Kuchenreuther and several other officers went to the Tomlinson residence (44:5, 9). Kuchenreuther testified that he knocked on the back door, identified himself as a police detective, and asked if he could come in to look for John Tomlinson (44:12-14). The detective was "met at the back door by a black female 15 to 16 years of age, and she allowed us in, and standing behind her was John Tomlinson" (44:9). Kuchenreuther testified that, after he asked for permission to enter, "they told me who they were, and I came in." (44:14). The detective did not recall what else Tomlinson or the youth may have said to express their consent, but testified that "[t]hey opened the door, she walked into the house, and I followed her" (44:14).[1]

The record of the suppression hearing does not specifically identify the person who answered the door (*see* 44:9, 14). However, the youth did identify herself to Kuchenreuther (44:14). Kuchenreuther also had gotten physical descriptions of Tomlinson's daughters and wife from Angela Green (44:8). The detective knew that Tomlinson lived at the premises with his two daughters

[1]Kuchenreuther testified that, although he did not recall exactly what was said after he knocked on the door, "they may have called to John or someone else, or someone else in the house might have said who's there or whatever" (44:14).

and his wife (44:8). At trial, the prosecutor asked Kuchenreuther who besides Tomlinson was present at the house when he entered it on February 27. Kuchenreuther responded, "His wife, Michelle, two of his daughters, Monteria and Keesha (sic) I believe" (44:74).[2] There was never any mention of persons other than Tomlinson, his wife, and two daughters present in the home on February 27. The only reasonable inference from the record is that the youth who answered the door was one of Tomlinson's daughters.

Apparently, there was a set of stairs leading from the back door to the kitchen and Tomlinson was standing at the top of those stairs at the entrance to the kitchen when the police entered the house (44:16). The police followed Tomlinson's daughter from the backdoor, up the stairs, and into the kitchen (44:14,16). The police placed John Tomlinson, his wife Michelle and their two daughters (identified as Monterio and Kamisha) under arrest because they matched Angela Green's description of the suspects (44:9-10). After being placed under arrest, Michelle, Kamisha and Monterio asked if they could put on their socks and shoes, which were located in a bedroom that adjoined the kitchen (44:10). The officers allowed them to do so, but for safety reasons followed them into the bedroom (44:10-11). When the police entered the bedroom, they could see in plain view, lying between the bed and a wall, a baseball bat and some broom or mop handles (44:11-12). Recognizing these items as the possible murder weapons, the police seized them as evidence (44:11).

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[2]When reviewing an order on a motion to suppress evidence, an appellate court may take into account the evidence at the trial, as well as the evidence at the suppression hearing. *State v. Griffin,* 126 Wis. 2d 183, 198, 376 N.W.2d 62 (Ct. App. 1985).

C. Standard of Review

A reviewing court applies a two-step standard of review to constitutional search and seizure inquiries. *State v. Matejka*, 2001 WI 5, 241 Wis. 2d, 52, ¶16, 621 N.W.2d 891. First, in reviewing a motion to suppress, the court upholds the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). The court then independently evaluates those facts against a constitutional standard to determine whether the search was lawful. *Matejka*, 241 Wis. 2d, 52, ¶16. Whether certain words, gestures or conduct constitute consent is a finding of historical fact. *State v. Phillips,* 218 Wis. 2d 180, 196-97, 577 N.W.2d 794 (1998).

One well-established exception to the warrant requirement of the Fourth Amendment is a search conducted pursuant to consent which is "freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Here, Tomlinson does not challenge the voluntariness of the consent given by the girl who answered the door; the issue involves her authority to permit the officers to enter the house and whether she actually consented to the entry. The court of appeals specifically noted that Tomlinson had not challenged the voluntariness of the consent nor had he asserted that the consent was the result of coercion or duress. *Tomlinson,* 247 Wis. 2d 682,, n.3.

D. Tomlinson's daughter had both the actual and apparent authority to permit the police to enter her parents' home.

Tomlinson initially maintains that the State failed to meet its burden of showing that the minor child who answered the door had authority to consent to the officers' entry. According to Tomlinson, this is because the State

never established that the youth was one of his daughters. As argued above, the State contends that Tomlinson waived this issue by failing to assert it in a timely manner in the trial court. Moreover, his argument lacks substantive merit because the record establishes that one of Tomlinson's two daughters answered the door and that she had the authority to permit at least a limited entry into her home.

When the record is viewed in its entire context, the only reasonable inference from the evidence is that the fifteen to sixteen-year-old girl who answered the door was one of Tomlinson's two daughters. Even before the police went to the Tomlinson home, they were aware through Angela Green that the defendant, his wife, and his two daughters all lived at the residence. The officers had viewed photographs of the defendant and were also aware through Ms. Green of the physical description of his daughters. Then, when the police knocked on the door and asked for permission to enter, a young girl answered and identified herself to Detective Kuchenreuther. There is no evidence to suggest that this young girl identified herself as someone other than one of Tomlinson's children. And, apart from the defendant's children, there was no evidence to suggest that any other teenage children were in the house at the time. When asked at trial who was present at the home besides Tomlinson, Kuchenreuther answered that Tomlinson's wife and two daughters were present (44:74). Thus, although Kuchenreuther did not state explicitly who the young girl at the door was, the only reasonable inference is that the girl who answered the door was one of Tomlinson's teenage daughters.

The court of appeals determined that it was not unreasonable for the detective to believe that the person who answered the door was Tomlinson's teenage daughter.

> The evidence in the record strongly supports the logical inference that the girl who answered the door was one of Tomlinson's daughters. His two

> daughters were fourteen and fifteen years old. The police had been given a description of the family by Green, and were advised by Green that Tomlinson lived with his wife and two teenage daughters. There was no other visitor or person mentioned. . . . Here, it was not unreasonable for the police officers to believe that the teenage girl who answered the door was one of Tomlinson's daughters, and that she had mutual use of the property sufficient to consent to the entry.

State v. Tomlinson, 247 Wis. 2d 682, ¶17.

The next issue is whether Tomlinson's daughter had the actual or apparent authority to allow the officers to enter the kitchen area of the house. One well-settled exception to the Fourth Amendment warrant requirement is the doctrine of third-party consent. *See United States v. Matlock*, 415 U.S. 164, 171 (1974); *Kieffer*, 217 Wis. 2d at 540.

In *Matlock,* the United States Supreme Court explored the boundaries of the third-party consent doctrine, holding that common authority over the premises to be searched confers third-party capacity to consent:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 171 (footnote omitted).

The Wisconsin courts have not directly addressed the issue of a child's third-party capacity to consent to a

search of his or her parents' home.[3] Still, the cases from other jurisdictions often hold that a teenage child has actual, common authority with a parent to consent to an entry, at least into the common areas of their shared home. *See, e.g., Doyle v. State,* 633 P.2d 306 (Alaska Ct. App. 1981) (teenager could allow police to enter living room to talk with father); *Harmon v. State*, 641 S.W.2d 21 (Ark. Ct. App. 1982) (sixteen-year-old girl could admit police and then produce murder weapon); *Mears v. State*, 533 N.E.2d 140 (Ind. Ct. App. 1989) (fourteen-year-old can consent to police entry when police asked if defendant at home).

Professor LaFave has explained that two factors -- the age of the child and the scope of the consent given -- are particularly important in determining whether a minor shares common authority with parents over the home. *See* 3 Wayne R. LaFave, Search and Seizure, § 8.4(c) at 773, (3rd ed.). LaFave explains:

> The former [the age of the child] is important, for as children grow older they gradually acquire discretion to admit whom they will on their own authority, and thus it is important to examine the child's mental maturity and his ability to understand the circumstances in which he is placed and the consequences of his actions. And the latter [the scope of the consent given] is important because there are degrees of privacy in various parts of a family home, so that even a person with a lesser interest than the parents might admit persons to some areas but not others. Thus, even a child in his teens could not give a valid consent to the police to

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[3]However, in *Laasch v. State,* 84 Wis. 2d 587, 592-93, 267 N.W.2d 278 (1978), this court held that the State had not shown that defendant's five-year-old son possessed the capacity, intelligence, or authority to give constitutionally effective consent to a midnight entry into the parents' home. *See also, State v. Anderson,* 165 Wis. 2d 441, 451-52, 477 N.W.2d 277 (1991). In the context of an attenuation analysis, the court found that reliance upon a fifteen-year-old daughter's permission to search was not so improper as to be labeled flagrant misconduct, even though both the daughter and the mother testified that the daughter did not have permission to let people into the house.

> conduct a thorough search of the premises. On the other hand, a teenager might be deemed to possess sufficient authority to allow the police to enter and look about generally, and even a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted.

Id. at 773-74 (quotations and citations omitted).

The court of appeals applied these two factors to the facts of this case and determined that the youth's age (fourteen or fifteen) was within the range where "courts usually find that the child has acquired the discretion to admit persons on their own authority." *Tomlinson,* 247 Wis. 2d 682, ¶19. The court further noted that the scope of the search in this case was extremely limited. "Here, the consent was access into a common area of the home, the front entranceway and the kitchen, as opposed to the entire residence, or what could arguably be considered more private areas." *Id.* at ¶20. In fact, Tomlinson appears to have limited his challenge to the initial entry. He does not dispute the officers' right to follow the mother and daughters into the bedroom for safety reasons or the fact that the baseball bat was discovered in plain view.

The weight of the case law recognizes that, in the absence of evidence to the contrary, even very young children have the authority to permit a limited entry into the common areas of a home, as opposed to an all-out search of the entire residence. *See In Re Anthony F.*, 442 A.2d 975 (Md. 1982) (sixteen-year-old girl, the suspect's sister, could allow police to "stand just inside the front door"); *State v. Griffin*, 756 S.W.2d 475, 484 (Mo. Ct. App. 1988) (thirteen-year-old could consent to police entry of common areas of house for purpose of speaking to her mother); *Lenz v. Winburn*, 51 F.3d 1540, 1543, 1548-49 (11th Cir. 1995) (nine-year-old girl had common authority to permit entry into living room of duplex in which legal guardians resided).

In an analogous case, *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964), federal and state agents went to the home of Albert Davis, a suspect in a marijuana smuggling operation, in an attempt to talk to him. After knocking on the door to his Los Angeles home, an eight-year-old girl (Pamela Davis) answered the door. One of the agents said they would like to talk to Albert Davis and the girl said, "Come in." *Davis*, 327 F.2d at 302. The agents entered the house and, as they stepped through the door, one of the officers observed a wastebasket containing a green leafy substance, which he recognized as marijuana. *Id.*

The court found that the eight-year-old girl had the authority to permit this initial entry, at least in the absence of any indication in the record that her opening the door and invitation to enter were not "unusual or unexpected or unauthorized acts." *Id.* at 304. The court explained:

> It was not unlawful for the officers to do as the testimony here showed: knock on the door, and when the door was opened, stated, "I would like to talk to Albert Davis." When the one who opened the door said "Come in," neither the time, nor the officers' intent, nor the total circumstances, nor the Fourth Amendment demanded that they should remain outside.

Id. at 305. *See also, State v. Jones*, 591 P.2d 796 (Wash. Ct. App. 1979) (thirteen-year-old could consent to entry into living room; court commented that the *Davis* approach was "a sound rule to follow").

Similarly, in this case, Detective Kuchenreuther testified that he knocked on the door and asked if the officers could come in to look for John Tomlinson (44:12-14). When Tomlinson's teenage daughter opened the door, Tomlinson was standing behind her (44:9). Despite his presence in the general area, the record is devoid of any evidence that Tomlinson ever objected to the entry or that he gave his daughter instructions to not let the police in. Then, at the officers' request, the young girl opened

the door and allowed the officers to follow her into the house (44:14). Again, there is no indication in the record that Tomlinson protested the officers' presence in his house, even after they walked all the way into the kitchen.

One factor that courts may consider in determining whether a child shares joint authority over the home is whether the minor had parental permission to allow others to enter the home. *See Saavedra v. State,* 622 So. 2d 952, 958 (Fla. Dist. Ct. App. 1993). The fact that Tomlinson was present when his daughter allowed the police to enter, yet did not object, is evidence that the child had Tomlinson's permission to let people into the house. *Cf. Matejka,* 241 Wis. 2d 52, ¶37 (consent valid where the defendant was present and aware that another had consented to search of the interior of a vehicle and the defendant made no attempt to circumscribe the scope of the search to exclude his property); *United States v. Wesela,* 223 F.3d 656, 661 (7th Cir. 2000) (defendant's wife implicitly consented to search of home, in part, because, given the proximity of the rooms, she was "probably aware of what was going on" in the house and could have objected to the search).

Even if this court should find that Tomlinson's daughter lacked the actual authority to consent to the entry, the officers were reasonable in their belief that she did. "The United States Supreme Court has recognized that even if a third party lacks common authority to consent to a search of the defendant's residence, police may rely upon the third party's apparent common authority to do so, if that reliance is reasonable." *Kieffer*, 217 Wis. 2d at 548 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 186-87 (1990)).

Kieffer explained that the "question for the courts is whether the information available to the police officers at the time of the search would justify a reasonable belief that the party consenting to the search had the authority to do so." *Id.* Still, the court in *Kieffer* cautioned that:

> [O]fficers may not always take third-party consent to a search at face value, but must consider the surrounding circumstances. That consideration often demands further inquiry. "Even when the (consent) is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."

Id. at 549 (quoting *Rodriguez*, 497 U.S. at 188).

Relying on *Saavedra,* Tomlinson contends that the officers were required to make further inquiries of his daughter before relying on her apparent authority to consent to the entry. Tomlinson's brief at 14. Tomlinson seems to contemplate some type of interview of children who answer the door to determine the youth's age, maturity, and intelligence and to ascertain factors such as whether the minor had authority to allow entry into the home, had a key to the home, or shared household duties with the parent. Tomlinson's brief at 11-12.

Tomlinson's situation is distinguishable from the facts presented in *Saavedra.* In *Saavedra,* the officer did not ask the boy who answered the door who he was or what connection he had with the premises. *Saavedra,* 622 So.2d at 958-59. In the present case, the detective had physical descriptions of the persons living at the house. He knew that Tomlinson lived with his wife and two daughters. Finally, the young girl who answered the door identified herself. Although the suppression hearing testimony is scant concerning the youth's authority to consent to the police entry, the situation was not ambiguous to the officers at the scene. The officers knew the youth's identity and her connection with the premises. Furthermore, because of Tomlinson's presence and his failure to object to his daughter's actions, it was apparent to the officers that the daughter had Tomlinson's permission to consent to their entry. In the present case, the surrounding circumstances did not present ambiguous circumstances demanding further inquiry. *See Kieffer,* 217 Wis. 2d at 549; *see also United States v. DiPrima,*

472 F.2d 550, 552 (1st Cir. 1973) ("[t]o some extent the police must be allowed to rely upon the word of the householder and general appearances").

As a general proposition, the Michigan Court of Appeals has said:

> [T]his Court decline[s] to impose an obligation on the police to make a further inquiry regarding a third party's ability to validly consent to a search unless the circumstances are such as to cause a reasonable person to question the consenting party's power or control over the premises or property.

People v. Goforth, 564 N.W.2d 526, 530 (Mich. Ct. App. 1997).

Here, the information known to the officers at the time of the entry supported a reasonable belief that Tomlinson's daughter had the apparent authority to permit the entry. There were no unusual circumstances that should have caused the officers to question that belief.

E. Tomlinson's daughter consented to the entry when, following the officer's request to come in, she opened the door and allowed the officers to follow her into the house.

Tomlinson next asserts that the State failed to prove that the young girl answering the door actually consented to the officers' entry. According to his brief, the "actions of the young girl answering the door were entirely consistent with a person turning away from the door in order to inform either the owner of the house, the persons living there, or a parent, that someone was at the door to speak with them." Tomlinson's brief at 17-18.

While this is one conceivable view of the evidence, the trial court expressly found that the young girl's actions

constituted consent for the police to enter (44:18). Whether conduct constitutes consent is a finding of historical fact, which a reviewing court must uphold unless it is clearly erroneous. *Phillips,* 218 Wis. 2d at 196-97. The trial court's finding that the teen consented is not contrary to the great weight and clear preponderance of the evidence.

A person does not need to indicate his or her consent orally, but can demonstrate consent through conduct. *Phillips,* 218 Wis. 2d at 197. Tomlinson's daughter indicated her consent by her conduct in response to the officers' request to come in the home. The police knocked on the door. When the youth answered their knock by opening the door, the police identified themselves, told the youth why they were at the residence, and asked if they could come in. In response to the officers' request to come in, the youth left the door open, turned around, and proceeded to walk up the steps into the kitchen. She allowed the officers to follow her into the kitchen without objection (44:9, 12-14, 16). Detective Kuchenreuther repeatedly testified that the girl "allowed" him into the house (44:9, 12, 14, 16). Based on the totality of the circumstances and in further reliance on the credibility of the officer's testimony, the trial court found that the "entry was certainly consensual" (44:18).

The court of appeals appropriately deferred to the trial court's factual finding of consent, stating:

> Tomlinson argues that this testimony could support the inference that the teenage girl merely turned to inform her parents that someone was at the door. Although we do not disagree that this is another rationally based view of the evidence, the trial court, after personally observing the testimony of Detective Kuchenreuther, found that the teenage girl expressly consented to the entry when she opened the door and allowed the officers to walk in behind her. The record supports the trial court's finding that the teenage girl's response to the detective's request to enter--opening the door, walking into the house, and allowing the officers to

> follow her into the house--was sufficient to convey her consent.

State v. Tomlinson, 247 Wis. 2d 682, ¶15.

In *United States v. Walls*, 225 F.3d 858 (7th Cir. 2000), agents went to Wall's residence in order to ask her questions about suspicious packages that had just been delivered. *Id.* at 862. When the agents knocked at the door, the occupants of the house initially refused to open the door and shouted that the agents could not enter and that they needed a warrant. However, when Walls came to the door, the agents identified themselves and informed her that they were conducting an investigation regarding the packages. *Id.* In response to that statement, Walls opened the door and stepped back to allow their entrance. *Id.*

The Seventh Circuit Court of Appeals affirmed the trial court's finding that Walls gave consent to the entry, stating that:

> It is well established that consent may be manifested in a non-verbal as well as a verbal manner, . . . and her action in opening the door and stepping back to allow the entry was sufficient to convey her consent under these circumstances.

Walls, 225 F.3d at 863 (citations omitted). *See also United States v. Rosario*, 962 F.2d 733 (7th Cir. 1992) (upholding consent where occupant of motel room gestured for the officers to enter and stepped back, opening the door); *Chase v. State*, 706 A.2d 613 (Md. 1998) (finding consent to enter when, after defendant's wife answered the door in response to police knocking, the police asked if the defendant was at home and told her they needed to speak with him; she responded by "open[ing] the door wider and step[ping] out of the doorway," thereby allowing the officers to pass her and walk into the house).

It is true that a person need not object to "gain the Fourth Amendment's protection. Consent cannot be found by a showing of mere acquiescence." *State v. Johnson,* 177 Wis. 2d 224, 234, 501 N.W.2d 876 (Ct. App. 1993). However, courts have routinely found consent on facts similar to the present action. *See, e.g., United States v. Griffin,* 530 F.2d 739, 743 (7th Cir. 1976) (finding consent where, in response to the officer's request to enter, the subject "stepped back, leaving the door open, and led the officers into the apartment"). The critical factor in cases holding the contrary appears to be the failure of the police to actually issue a request to enter the premises. *See Turner v. State,* 754 A.2d 1074, 1082-83 (Md. 2000) (collecting cases); *see also Johnson,* 177 Wis. 2d at 233-34 (noting that the officers had not asked Johnson for permission to enter his apartment). These cases suggest that, if the officers fail to request permission to enter the premises, the subject's conduct cannot fairly be interpreted as a nonverbal assent to the officers' request.

> Yet, in all of these cases, the police made it known, either expressly or impliedly, that they wished to enter the defendant's house, or to conduct a search, and within that context, the conduct from which consent was inferred gained meaning as an unambiguous gesture of invitation or cooperation or as an affirmative act to make the premises accessible for entry. By contrast, in those Fourth Circuit cases in which the court concluded that the facts could not support a finding of implied consent, the law enforcement officers either did not ask for permission to enter or search, and thus did not make known their objective, or, if they did, their request was met with no response or one that was nonspecific and ambiguous.

Turner, 754 A.2d at 1082-83.

Here, the officers unequivocally asked the youth for permission to enter Tomlinson's home. It was reasonable for the officers to believe that the youth's actions in leaving the door open, turning around, and allowing the officers to follow her up the stairs into the kitchen were in response to the officers' request to enter

and that the youth's actions indicated an affirmative agreement to the officers' entry. Consequently, the trial court's finding of consent based on the totality of the circumstances and the detective's testimony is not clearly erroneous.

II. OTIS COLEMAN'S PERSISTENT REFUSAL TO TESTIFY AT TRIAL RENDERED HIM UNAVAILABLE, THEREBY PERMITTING THE INTRODUCTION OF HIS PRIOR TESTIMONY AT THE PRELIMINARY HEARING.

A. Introduction and the Decisions Below

At trial, the State sought to introduce the preliminary hearing testimony of prosecution witness Otis Coleman after he refused to testify and invoked his Fifth Amendment right to be free from compelled self-incrimination (44:102-03; 45:3-4). Tomlinson objected, arguing that the admission of Coleman's prior testimony would deprive him of his right to confront and cross-examine Coleman at trial (44:97-98, 101-02).

The trial court first ruled that Coleman's refusal to testify rendered him "unavailable" and his preliminary hearing testimony admissible under Wis. Stat. § 908.045(1), the "former testimony" exception to the hearsay rule (*id.*).[4] Second, addressing the Confrontation

[4]Wis. Stat. § 908.045 provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness: "(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."

Clause issue, the court found that Coleman's prior testimony, given under oath during the preliminary hearing, was presumptively reliable because it fit within a firmly rooted hearsay exception (44:102).

On appeal, Tomlinson argued that the introduction of Coleman's preliminary hearing testimony violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Art. I, sec. 7 of the Wisconsin Constitution. The court of appeals rejected Tomlinson's arguments, holding that Coleman's preliminary hearing testimony met the requirements for admission under Wis. Stat. § 908.045, as well as federal and state constitutional principles. *Tomlinson*, 247 Wis. 2d 682, ¶22-33. The appellate court initially recognized that, despite the trial court's orders requiring Coleman to testify, "Coleman persistently refused to answer the questions" and, therefore, the trial court correctly found Coleman "unavailable." *Id.* at ¶29. Then, applying well-settled Confrontation Clause principles, the court noted that Coleman's prior testimony fit within a firmly rooted hearsay exception. *Id.* at ¶30. Finding no unusual circumstances that would justify the exclusion of the preliminary hearing testimony and that Tomlinson had an adequate opportunity to cross-examine Coleman at the preliminary hearing, the appellate court affirmed the admission of the evidence at trial. *Id.* at ¶31-33.

In his brief to this court, Tomlinson has abandoned his assertion that he was not afforded an adequate opportunity to cross-examine Coleman at the preliminary hearing. He now asserts only that the lower courts erred in finding Coleman "unavailable" for purposes of the Confrontation Clause. Tomlinson's brief at 24-27.

B. Factual Background

Preliminary hearing.

At the preliminary hearing, the State called Coleman as its only witness (38:3). Coleman testified that, on the late evening of February 5 or early morning of February 6, 1999, he and Lewis Phillips were walking westbound on West Chambers Street in Milwaukee when they saw Tomlinson, a black female, and an individual known to Coleman as Rob approaching from the opposite direction (38:4-6). Phillips asked the woman if she would sell him a cigarette for twenty-five cents (38:5). When the woman said that she wanted fifty cents for a cigarette, Phillips responded "25 cents bitch" (38:6).

Tomlinson asked Phillips "What did you call my wife?" (38:6). When Phillips repeated his earlier comment, a confrontation appeared imminent (38:7-8). However, Coleman apologized for Phillips' comment and Tomlinson "backed off" (38:8). Tomlinson left the area, but told Phillips to be there when he returned (38:9).

About two minutes later, as Phillips and Coleman continued westbound on West Chambers, Tomlinson "came out of nowhere carrying a baseball bat" (38:10). Tomlinson hit Phillips in the leg and then hit him with a forceful blow on the left side of the head, which caused Phillips to fall to the ground (38:13-15). When Coleman tried to assist Phillips, Tomlinson told Coleman to leave the area (38:15). As Coleman turned to leave the scene, he saw Tomlinson swing the bat again and then heard a "clunk" sound "like he hit him again" (38:15).

Cross-examination of Coleman.

At the preliminary hearing, defense counsel asked twenty-four questions of Otis Coleman on cross-examination (38:16-19). The court sustained the State's

objection to only one of those questions on the grounds of lack of relevance (38:17).[5]

On cross-examination, Coleman admitted that he had not called the police and that he had left his friend lying face up in the street (38:17). Counsel established that Coleman did not see Tomlinson hit Phillips a third time and that it was only a "possibility" that Tomlinson had hit Phillips with the bat "one more time" (38:17). Coleman also said that he was standing about ten feet behind Phillips when Tomlinson came on the scene a second time (38:18).

Defense counsel further established that Coleman could not pinpoint exactly where Tomlinson had hit Phillips and that, after Phillips went down, Coleman "didn't really look" at what was happening because he was making his retreat (38:19). Coleman admitted that he had never seen the defendant prior to the date of this incident (38:18).

Motion Hearing.

During the second day of trial, the prosecutor advised the court that, if called to the witness stand, Coleman would refuse to testify (44:85). The prosecutor explained that Coleman had indicated through counsel that he did not want to be "labeled a snitch," that he feared for his safety, and that he would invoke the Fifth Amendment if called to the stand (44:85). The prosecutor requested that the court order Coleman to testify and, if he refused, to declare Coleman "unavailable," permitting the State to admit Coleman's preliminary hearing testimony as substantive evidence under Wis. Stat. § 908.045(1) (44:86). The prosecutor advised the court that he would be willing to stipulate to the introduction of various

[5]The circuit court sustained the State's objection to defense counsel's question about how far Phillips had to walk to get to the home of his sister, who lived "two doors" from where Phillips and Coleman were standing (38:17).

categories of impeachment material, including Coleman's prior convictions, his prior statements, and a memorandum (Trial Exhibit 18A) outlining the benefits Coleman received because of his cooperation in the investigation (44:87, 98-101).

Following the prosecutor's initial statement, the parties questioned Coleman under oath outside the jury's presence (44:90-96). In response to the prosecutor's questions about Coleman's knowledge of the homicide, Coleman repeatedly invoked the Fifth Amendment (44:90-95). When the court ordered Coleman to answer the prosecutor's questions, Coleman persisted in his refusal (44:92-94).[6] Coleman said he did not wish to say anything that might "tend to incriminate me or get me harmed in any way, shape or fashion . . . by you, the Court, anybody" (44:91). Coleman emphasized that he was invoking the Fifth Amendment as to "anything" the State might ask him about (44:92). Under questioning by defense counsel, Coleman repeated that he was afraid of "[t]he Judge, you, the plaintiff's family, everybody" (44:95).

Defense counsel objected to the introduction of Coleman's preliminary hearing testimony on several grounds. First, counsel argued that the court should find Coleman in contempt and bring him back into court the next day in order to give him the opportunity to change his mind about refusing to testify (44:97). The trial court ruled that it could not hold Coleman in contempt because of his assertion of his Fifth Amendment rights and that, even if it could, the court could not require Coleman to waive the privilege (44:98). The court found Coleman unavailable within the meaning of Wis. Stat. § 908.04 based on his refusal to answer questions and the invocation of his Fifth Amendment rights (44:98).

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[6]As the court of appeals summarized in its decision, the trial court ordered Coleman to answer the prosecutor's questions at least five separate times and each time Coleman refused (44:90-95). *See Tomlinson*, 247 Wis. 2d 682, ¶¶26-28.

Defense counsel further objected to the introduction of the preliminary hearing transcript based on the "limited scope" of preliminary hearings in Milwaukee County (44:101). Counsel argued that the introduction of the transcript would deprive him of a full and fair opportunity to cross-examine Coleman as to his credibility, which "is not an issue in the preliminary hearing court" (44:102).

The court ruled that it would admit the preliminary hearing transcript, finding no "unusual circumstances" that would prevent the admission of this evidence (44:102; *see also* 45:3-4). The court noted that defense counsel would have the opportunity to introduce impeachment materials. "That -- that additional information certainly levels the playing field, so the Court will be inclined to do that" (44:102-03).

C. Standard of Review

Generally, "[t]he admissibility of former testimony [under Wis. Stat. § 908.045(1)] is discretionary with the trial court," subject to review for an erroneous exercise of discretion. *State v. Drusch*, 139 Wis. 2d 312, 317-18, 407 N.W.2d 328 (Ct. App. 1987). A trial court erroneously exercises its discretion "if the record shows that the trial court failed to exercise its discretion, [if] the facts fail to support the trial court's decision, or [if the appellate] court finds that the trial court applied the wrong legal standard." *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986).

Nevertheless, where the focus of the trial court's ruling is on the constitutional right of the defendant to confront the unavailable witness, the issue is more properly characterized as one of constitutional fact, subject to independent review. *Cf. State v. Stutesman*, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

D. The test for admission of former testimony of a State witness against a criminal defendant.

Under the Sixth and Fourteenth Amendments to the federal constitution and Art. I, sec. 7 of the state constitution, a criminal defendant in Wisconsin enjoys the right to confront the witnesses against him or her. "The primary purpose of the confrontation right is to ensure the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence admitted in a criminal case." *State v. Bauer*, 109 Wis. 2d 204, 208, 325 N.W.2d 857 (1982).

This court has summarized the standard to be applied for determining the admissibility of hearsay evidence against a criminal defendant in accord with the constitutional right of confrontation as follows:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability. If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible. This inference of reliability does not, however, make the evidence admissible per se. The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence. If the evidence does not fall within a firmly rooted hearsay exception, it can be admitted only upon a showing of particularized guarantees of trustworthiness.

Bauer, 109 Wis. 2d at 215; *see also Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

With respect to the question of unavailability, the "basic litmus" is established: "[A] witness is not

unavailable for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Ohio v. Roberts*, 448 U.S. at 74 (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968))(emphasis in original). As the Supreme Court has explained:

> The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.

Ohio v. Roberts, 448 U.S. at 74 (emphasis in original). In the end, the "lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness. The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id.* (internal citations and quotation marks omitted).

E. Otis Coleman's persistent refusal to testify despite direct court orders rendered him unavailable for Confrontation Clause purposes.

In this court, Tomlinson's sole contention is that the trial court erred in finding that Coleman was unavailable as required by the Confrontation Clause because Coleman improperly invoked the Fifth Amendment as a basis for

refusing to testify.[7] Tomlinson's brief at 24-27. However, even if Coleman did not properly invoke his Fifth Amendment rights, the trial judge nevertheless ordered Coleman to testify and he persistently refused. Therefore, the circuit court correctly ruled that Coleman was "unavailable" within the meaning of established Confrontation Clause jurisprudence.

According to Tomlinson, the trial court should have "delved further" into the legitimacy of Coleman's Fifth Amendment assertion before declaring him unavailable. This is because the primary basis for Coleman's assertion of the privilege -- his fear of physical reprisal -- does not constitute a legitimate basis for invoking the Fifth Amendment. Tomlinson's brief at 24 (citing *Dupuy v. United States*, 518 F. 2d 1295 (9th Cir. 1975)).

Tomlinson asserts that the trial court mistakenly believed it could not delve further into Coleman's reasons for invoking the Fifth Amendment. Tomlinson's brief at 25. According to Tomlinson, this caused the court to refuse to take the additional step of ordering Coleman to appear the next day to provide testimony under the threat of contempt. *Id.* at 25.

Admittedly, Coleman may not have properly invoked his Fifth Amendment rights. Furthermore, the trial court may not have been correct in its apparent belief that it had no authority to ascertain the legitimacy of Coleman's invocation of the Fifth (44:98). *See Hoffman v. United States*, 341 U.S. 479, 486-88 (1951) (holding that

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[7]Wis. Stat. § 908.04(1)(b), which appears to mirror the constitutional requirement of unavailability, provides, in relevant part, that the phrase "unavailability as a witness" includes situations in which the defendant:

> (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the judge to do so. . . .

it is for the court to determine whether silence is justified and to require a witness to answer if it clearly appears that the witness is mistaken in his belief that answering would incriminate him).

However, these observations are of no moment, since the trial court *did* order Coleman to testify and Coleman persistently refused to do so. *See State v. Buelow*, 122 Wis. 2d 465, 475, 363 N.W.2d 255 (Ct. App. 1984) (holding that a witness's refusal to testify despite a court order requiring her to do so "meets the legal definition of unavailability stated in sec. 908.04(1)(b), Stats."); *see also State v. Sharlow*, 110 Wis. 2d 226, 235, 327 N.W.2d 692 (1983).

As a result, in spite of the trial court's mistaken belief that it could not delve into Coleman's reasons for asserting his Fifth Amendment rights, the court ordered Coleman to answer the prosecutor's questions at least five times. Hence, any arguable error in the court's legal analysis had absolutely no impact on the State's inability to secure Coleman's testimony at trial. The record conclusively established that, whatever action the court might have threatened, Coleman was going to persist in his refusal to testify (*see* 44:92-94). As the Supreme Court emphasized in *Roberts*, "the law does not require the doing of a futile act. . . . The lengths to which the prosecution must go . . . is a question of reasonableness." *Roberts,* 448 U.S. at 74.

Buelow, supra, is an analogous case. There, a prosecution witness (Honey Lou Suttner) refused to testify during the arson trial of Ralph and Carol Buelow on Fifth Amendment grounds, after which the state granted her immunity from prosecution. *Buelow,* 122 Wis. 2d at 474. The trial court then ordered her to testify, but Suttner persisted in her refusal and the court found her in contempt of court. It then found the witness to be unavailable and admitted her prior John Doe testimony and police statement under Wis. Stat. § 908.045(4), the

exception to the hearsay rule for statements against interest. *Id.* at 474.

On appeal, the Buelows claimed that the admission of this evidence was improper both on evidentiary and Confrontation Clause grounds. The appellate court sustained the finding of unavailability, noting that the state had made a good faith effort to compel Suttner's testimony. However, despite the court's orders and a grant of immunity, she "simply refused to testify." *Id.*

Similar to Tomlinson, the Buelows asserted that the trial court should have adjourned the trial so the witness could have had time to consult with a lawyer on the penalties for refusing to comply with the court's order. *Id.* at 478. The court of appeals rejected this suggestion as a "futile act" and found that the prosecution was required only to go to reasonable lengths to produce the witness. *Id.* at 478 (quoting *Roberts*, 448 U.S. at 74).

Here, the trial court might have taken additional steps such as contempt orders to create a more complete record of Coleman's refusal to testify. *See Tomlinson*, 247 Wis. 2d 682, ¶29. However, this approach was not constitutionally necessary. Coleman's steadfast refusal to testify in the face of repeated court orders demonstrated that further efforts to force his testimony would have been futile. As the court of appeals held, the record "clearly demonstrates that Coleman persistently refused to answer the questions, and there was no offer of proof that further inquiry would have made a difference to Coleman." *Id.* at ¶29. Accordingly, Coleman was "unavailable" as a trial witness and his preliminary hearing testimony was properly admitted at trial.

III. A TRIAL COURT NEED NOT PERSONALLY VOIR DIRE A DEFENDANT BEFORE ACCEPTING A STIPULATION TO AN ELEMENT OF THE OFFENSE, WHERE THE DEFENDANT HAS THE ASSISTANCE OF COUNSEL AND IS NOT WAIVING HIS RIGHT TO A JURY TRIAL ON THE STIPULATED ISSUE.

A. Introduction and Decisions Below

Without objection from either party, the court told the jury that, for purposes of the increased penalty for using a dangerous weapon, the phrase "[d]angerous weapon means a baseball bat" (45:64).[8] Immediately after the instructions were given, the prosecutor advised the court that, rather than having the court direct the jury to find that the bat was a dangerous weapon, "it should be up to the jury to determine if a baseball bat is a dangerous weapon" (45:66-67). Consequently, the prosecutor requested that the court instruct the jury, consistent with Pattern Jury Instruction 990 and Wis. Stat. § 939.22(10), that it must find that the bat constituted a "device or instrumentality which, in the manner it is used or intended to use -- to be used, is calculated or likely to produce death or great bodily harm" (45:67).

When the court asked defense counsel what he wanted to do, counsel responded "we want it the way it was read" (45:68). The prosecutor then emphasized that the effect of this instruction would be to relieve the State

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[8]Wis. Stat. § 939.22(10) provides that "[d]angerous weapon means any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon . . .; or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm."

of the burden of proving beyond a reasonable doubt that the baseball bat is a dangerous weapon (45:68). When asked directly if he understood that and wanted to maintain the instruction as given, both Tomlinson, personally, and his attorney repeated that the defendant wanted to leave the instruction the way the court had read it (*id.*). In light of these express agreements, the court gave no further instructions to the jury (45:69).

In the court of appeals, Tomlinson asserted for the first time that the trial court committed "plain error" when it instructed the jury that a "dangerous weapon means a baseball bat." He further claimed ineffective assistance of counsel for his attorney's failure to object to the form of the court's instruction. *Tomlinson*, 247 Wis. 2d 682, ¶¶34-42.

The court of appeals rejected both arguments, holding that:

1. Tomlinson waived his right to raise the jury instruction issue because "Tomlinson and his counsel made a knowing election between alternative courses of action, resulting in a strategic waiver of this instructional error." *Id.* at ¶36;

2. A more in-depth colloquy was not required because Tomlinson did not waive his right to a jury trial on the dangerous weapon issue; he merely conceded to an element of the charged offense and the element was submitted to the jury. *Id.* at ¶37; and

3. Trial counsel was not ineffective in failing to object to the court's instruction because, given the facts of the case (Tomlinson struck Phillips in the head with the bat, fracturing his skull and causing his eventual death), there "was no reasonable probability that the jury would not have found the baseball bat in this case to be a dangerous weapon." *Id.* at ¶41.

In this court, Tomlinson does not address the ineffective assistance of counsel claim, thereby waiving it. His sole contention is that, despite his position at trial, the trial court should not have accepted his stipulation without first conducting a personal colloquy designed to ensure that he was knowingly waiving his right to contest the issue. Tomlinson's brief at 27-35.

B. An extensive personal colloquy was unnecessary because Tomlinson stipulated, both personally and through counsel, that the baseball bat was a dangerous weapon and he did not waive his right to a jury trial on the "dangerous weapon" element.

Tomlinson asserts that, despite his express agreement with the court's instruction at trial, the court should have rejected his stipulation and instructed the jury on the statutory definition of a "dangerous weapon." Relying on our supreme court's decision in *State v. Howard*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), Tomlinson argues that, where the court's instructions entirely remove an element of the offense from the jury's consideration, a harmless error analysis does not apply and the defendant is automatically entitled to a new trial. *See Howard*, 211 Wis. 2d at 291-65 (holding that the complete failure to instruct the jury on the "nexus" element of the crime of possessing a firearm to facilitate a drug offense must result in automatic reversal).

The *Howard* case, however, did not involve a defendant who, as Tomlinson did here, expressly stipulated to a particular jury instruction, thereby explicitly conceding an element of the offense. Instead,

Howard addressed a forfeiture -- or waiver by silence[9] -- of an instructional error that inappropriately removed an element of the offense from the jury's consideration. This is an important distinction because the case law holds that a defendant may by way of stipulation "waive" important rights, including the right to a jury trial, even though that right could not be forfeited by silence. *See e.g., State v. Livingston,* 159 Wis. 2d 561, 569, 464 N.W.2d 839 (1991) (defendant must personally and affirmatively waive his right to a jury trial); *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973); *State v. Villarreal*, 153 Wis. 2d 323, 450 N.W.2d 519 (Ct. App. 1989).

Analogizing to another area of the law -- the realm of "other acts" evidence -- Tomlinson asserts that this court should require trial courts to engage defendants in an extensive personal colloquy before accepting a stipulation to an element of a criminal offense. Tomlinson points out that in *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), the court set forth a methodology for handling a defendant's stipulation to an element of a crime designed to prevent the State's introduction of "other acts" evidence on that element. *Id.* at 167.

But the analogy to the "other acts" issue does not transfer neatly to more routine stipulations of fact. In *Wallerman*, the appellate court adopted a special procedure "to ensure that the record contains conclusive evidence which the jury may rely on to find guilt before [the court] relieves the State of the duty to prove that element." *Id.* The court deemed this procedure necessary

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[9]The United States Supreme Court has emphasized the difference between waiver and forfeiture. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. . . . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano,* 507 U.S. 725, 733 (1993) (citations omitted); *see also Huebner,* 235 Wis. 2d at 493, n.2 (noting the same distinction between waiver and forfeiture).

because of the unique concerns inherent in the presentation of other acts evidence, including the danger of juror prejudice, distraction, and confusion of issues. *Id.*

The more appropriate analogy is to *State v. Benoit,* 229 Wis. 2d 630, 600 N.W.2d 193 (1999). In *Benoit*, this court held that the defendant's express personal waiver was not required where the defendant "merely conceded an element of the charged crime" but did not waive his right to jury trial on that element. *Id.* at 636-40. In that case, Benoit sought a jury trial on the issue of his involvement in the burglary. Prior to trial, he agreed not to challenge the issue of nonconsent so as to avoid having the restaurant owners testify. At the close of the evidence, he repeated his intention to waive the issue. The jury was then instructed that, because the parties had stipulated to the element of nonconsent, it was considered proven. *Id.* at 639.

Distinguishing *Benoit's* situation from the jury trial waiver in *Villarreal, supra*, the court explained:

> Unlike *Villarreal*, the nonconsent issue was not passed on to the court; instead, it was merely conceded by Benoit. Because the jury was instructed on all the elements of the crime, Benoit received a jury trial on every element. His stipulation, therefore, did not constitute a waiver of his right to a jury trial; and thus, Benoit did not need to make an express personal waiver to render the stipulation valid.

Id. Moreover, the court in *Benoit* expressly declined to adopt the *Wallerman* methodology. The court explained its rationale for distinguishing the cases. "Benoit's concession was a matter of expediency [and] unlike other acts evidence, the stipulated evidence here was not subject to such concerns as juror prejudice, distraction or confusion of issues." *Id.* at 640.

The holding in *Benoit* is consistent with the principle that stipulations of fact that dispense with the

need to offer proof of that fact are procedural in nature. *See State v. Aldazabal*, 146 Wis. 2d 267, 268-69, 430 N.W.2d 614 (Ct. App. 1988). The universal rule, therefore, is that the attorney for a criminal defendant has authority to agree to a stipulation of fact without consulting the defendant or obtaining his personal consent and this stipulation is binding on the defendant. *See, e.g., United States v. Cravero*, 530 F.2d 666, 671-72 (5th Cir. 1976); *State v. Jernigan*, 455 S.E.2d 163, 166 (N.C. Ct. App. 1995); *People v. DeJean,* 57 Cal. Rptr. 211, 230-31 (Cal. Ct. App. 1967); *Collins v. State,* 366 N.E.2d 229, 232 n.6 (Ind. Ct. App. 1977); *State v. Mihill,* 394 A.2d 1179, 1180 (Me. 1978); *State v. Post,* 513 N.E.2d 754, 766-67 (Ohio 1987); *Moore v. State,* 714 P.2d 599, 601-02 (Okla. Crim. App. 1986); 7A C.J.S., Attorney and Client, § 208c at 358 (1980); *see also State v. Harper*, 57 Wis. 2d 543, 548-50 (1973) (attorney could stipulate to admit stolen jewelry in evidence without consulting defendant or obtaining his consent).

The ability of the stipulated fact to itself establish an element of the offense does not make any difference. *See Jernigan*, 455 S.E.2d at 166; *DeJean,* 57 Cal. Rptr. at 230-31; *Post,* 513 N.E.2d at 766-67; *Moore,* 714 P.2d at 601-02. There is no cognizable difference between the evidentiary significance of an admission and other probative evidence establishing that element. *See Old Chief v. United States*, 519 U.S. 172, 191 (1997). They are merely "propositions of slightly varying abstraction." *Id.* at 190.

Thus, this court should hold, not only that no extensive personal colloquy was required, but that Tomlinson need not have personally spoken at all to effect a valid stipulation. In the absence of a viable claim of ineffective assistance of counsel (which Tomlinson no longer alleges), his attorney's stipulation to the court's instruction was sufficient. This is because, as in *Benoit*, Tomlinson did not waive his right to a jury trial as to this issue or pass it on to the court; instead, he merely conceded (presumably as a matter of expediency) that the

baseball bat used to kill the victim was a dangerous weapon. And, as in *Benoit*, because the jury was instructed on all of the elements of the crime, Tomlinson received a jury trial on every element. Thus, Tomlinson did not need to make an express personal waiver to render the stipulation valid.

Nevertheless, to the extent this court believes that some personal waiver was required, it should find that Tomlinson effected such a waiver. After being specifically advised that the effect of the court's instruction was to relieve the State of its burden of proving that issue, Tomlinson personally stated that he wanted the court's instruction to state that "a dangerous weapon means a baseball bat" (45:68). Under these circumstances, Tomlinson should not be permitted to "create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *Vanlue v. State,* 87 Wis. 2d 455, 460-61, 275 N.W.2d 115 (Ct. App. 1978). Thus, the court of appeals rightly held that "Tomlinson's single affirmative response under the facts and circumstances here was sufficient to waive the issue." *State v. Tomlinson,* 247 Wis. 2d 682, ¶37.

CONCLUSION

The State asks this court to affirm the court of appeals decision, Tomlinson's conviction and sentence, and the trial court's order denying postconviction relief.

Dated at Madison, Wisconsin, this 8th day of February, 2002.

Respectfully submitted,

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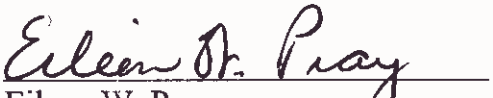
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,726 words.



Eileen W. Pray
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STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent.

-vs-

JOHN TOMLINSON, JR..

Defendant-Appellant-Petitioner

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Case No. 00-3134-CR

Trial Case NO. 99 CF 1079 (Milwaukee Co.)

APPEALED FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY,
THE HONORABLE JEFFREY A. WAGNER, PRESIDING

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IN SUPREME COURT

Case No. 00-3134-CR

STATE OF WISCONSIN,

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JOHN TOMLINSON, JR.,

Defendant-Appellant-Petitioner.

ARGUMENT

I. IT WAS NOT ESTABLISHED THAT THE GIRL WHO ANSWERED THE DOOR HAD ACTUAL OR APPARENT AUTHORITY TO PERMIT ENTRY.

The State claims that the defendant's daughter (whichever one) had both the actual and apparent authority to permit the police to enter the defendant's home. Regarding apparent authority, the State first argues that the issue was waived. We disagree. It is clear from the transcripts that the only issue at the suppression hearing was whether there was proper consent to enter (R. 44). Our postconviction motion alleged that the State did not meet its burden with respect to consent. After filing the motion a briefing schedule was established by the trial court. The question of apparent authority was briefed for the trial court (R. 33:4-6). Following the briefing the motion was denied without a hearing. An appeal was taken to the Court of Appeals. In the

Court of Appeals the State argued waiver. The Court of Appeals however addressed the issue on the merits after we argued that the issue had not been waived. We believe that this Court should also address the merits of the issue.

Regarding the girl's authority to allow entry the State recognizes that, under Matlock, it must establish her relationship to the premises in order to establish any authority to consent (Page 11 - State's Brief). Therefore, the State first attempts to establish who the person was who answered the door. The State argues that it is clear that the person was one of the defendant's two daughters. The State argues that when viewed in its entirety the only reasonable inference from the evidence is that the 15-16 year old girl who answered the door was one of Tomlinson's two daughters (Page 10 - State's Brief). The trial court determined that the girl who answered the door was a 16 year old daughter of the defendant (R. 44:18). Neither the State's argument nor the trial court's findings square with the testimony of Detective Kuchenreuther. At the suppression hearing the detective identified the black female who answered the door as being 15-16 years old (R. 44:9). He did not identify that girl as the daughter of the defendant. When testifying later that day at the trial the detective identified the defendant's daughters, testifying that they were 14 and 15 years old (R. 44:74). There does not appear to be any testimony in the

record establishing that the defendant had a 16 year old daughter. We do not believe that on this record it can be held that the State sufficiently established the identity of the person answering the door so as to allow a determination of that person's common authority, or other sufficient relationship, to the premises.

Regarding the issue of the authority of the person answering the door to consent to entry, the State identifies the age of the child and the scope of the child's consent as two important factors to consider when determining authority. In this case the State argues that the child's authority was limited in scope and therefore the entry was proper. (See Pages 12 and 13 - State's Brief).

The problem with the State's analysis is that there is nothing in the record indicating that the officers felt that their ability to enter the premises was limited in any way. Nothing in the record indicates the limited scope of authority granted to the person who answered the door. The officer who testified testified that he knocked on the back door of the residence (R. 44:9). Apparently the stairs from the back door led directly to the kitchen (R. 44:16).[1] The arrest took

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[1] The Court of Appeals erroneously indicated that in this case the consent was consent to access into a common area of the home, the front entrance-way and the kitchen, as opposed to the entire residence, or what can arguably be considered more private areas. State v. Tomlinson, 247

place in the kitchen (R. 44:10). It is clear from the testimony that the officers followed the girl straight up the steps, into the kitchen. and immediately arrested the defendant.

The Court of Appeals and the State define the scope of the girl's authority by the extent of the officer's actions. Since the officers went directly through the back door, up the back steps and into the kitchen to arrest the defendant, we are to infer that the girl's authority to allow entry was limited to those steps and that kitchen. There is absolutely no basis in the record to find that her authority was so limited. Therefore, we disagree that the evidence establishes that the scope of authority was limited to allowing the officers to enter into the kitchen. Additionally, we also disagree that the kitchen should be termed a common area of the home.

The State next attempts to establish actual authority to consent by arguing that Tomlinson had given the child permission to allow others entry into the home. The State argues that the fact that Tomlinson was present when his daughter allowed the police to enter, yet did not object, is evidence that the child had Tomlinson's permission to let people into the house. We believe that the State is

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Wis. 2d 682 ¶20.

attempting to transfer the burden of proof to the defendant. The State is arguing that the defendant has the obligation to object to entry; however, acquiescence to an unlawful assertion of police authority is not equivalent to consent. State v. Wilson, 229 Wis. 2d 256, 269, 600 N.W. 2d 14 (1999). In this case the evidence establishes that at least five officers went to the defendant's home with the intention of arresting him. The detective who testified went to a back door and immediately entered the house upon the door being opened. The detective observed the defendant in the kitchen and proceeded directly to the kitchen to arrest him. These facts establish nothing more than acquiescence. They certainly do not establish the scope of the girl's authority to allow entry into the premises.

The State next argues that even if it should be found that the girl who answered the door lacked actual authority to consent to the entry, the officers were reasonable in their belief that she could consent (Page 15 - State's Brief). The State quotes State v. Kieffer, 217 Wis. 2d, at 548 for the proposition that police may rely upon a third party's apparent common authority to consent if that reliance is reasonable. The State argues that the information available to the police officers at the time of the search justified a reasonable belief that the party consenting to the search had the authority to do so. The State argues that to some extent the

police must be allowed to rely upon the word of the householder and general appearances. (Page 17 - State's Brief). As we argued in our brief-in-chief, we believe that the concept of apparent authority should be of limited utility when analyzing consent by minors. Furthermore, the State in this case ignores the fact that there were no "words of the householder" to rely upon. Also, the "general appearances" consisted only of a teenage girl answering a back door and then turning away.

In this case the State has gleened identity, actual authority, apparent authority, scope of authority, and permission by a parent for entry, from the mere fact that the detective knew that the defendant had daughters and that a teenage girl answered the back door at the defendant's house. This is too big a stretch from these facts given the important Fourth Amendment protections involved.

II. THE GIRL DID NOT CONSENT TO ENTRY WHEN THE OFFICERS FOLLOWED HER INTO THE HOUSE.

In arguing that consent was given, the State cites a number of cases to establish the proposition that consent to search may be given non-verbally. We agree. However the cases cited by the State are distinguishable. In State v. Phillips, 218 Wis. 2d 180, 577 N.W. 2d 794 (1998), when asked whether there could be a search of his bedroom, the defendant

opened the door to and walked into his bedroom, retrieved a small baggie of marijuana, handed it over, and pointed out drug paraphernalia. In United States v. Walls, 225 F. 3d 858 (7th Cir. 2000), when agents knocked on the door, occupants of the house initially refused to open the door and shouted out that they needed a warrant. They used profane language. However, when the defendant went to the door, the agents identified themselves and informed the defendant of their investigation. The defendant then opened the door. Also, in United States v. Rosario, 962 F. 2d 733 (7th Cir. 1992), there was an affirmative gesture for the officers to enter. In our case there was simply no conduct or affirmative gesture authorizing entry similar to the conduct in the cases cited by the State. Furthermore, the cases cited by the State were not cases involving minors. A wife stepping aside and allowing someone to enter is, we believe, fundamentally different from a minor answering a door, saying little if anything, and then turning and walking away.

III. COLEMAN WAS NOT PROPERLY FOUND TO BE AN UNAVAILABLE WITNESS.

The State admits in its argument that Coleman may not have properly invoked his Fifth Amendment rights, but then argues that that does not undercut the basis for the trial court's finding because the court repeatedly ordered Coleman to testify, and Coleman persisted in his refusal to do so

(Page 30 - State's Brief). The State's argument rests on the court's finding, not encouraged by the State at trial, that Coleman was unavailable pursuant to sec. 908.04 (1)(b) Stats.[2]

We do not believe the record establishes that Mr. Coleman refused to testify pursuant to sec. 908.04 (1) (b). We do not believe that an analysis under that section of the statute can be conducted in isolation, ignoring the fact that the court allowed the defendant to take the Fifth. Sub.(1) (b) refers to a persistent refusal to testify concerning the subject matter of a statement despite an order of a judge to do so. In this case the trial court did not order Mr. Coleman to testify concerning the subject matter of his prior testimony because the court allowed Mr. Coleman to claim the protections of the 5th Amendment. The court only ordered Mr. Coleman to answer a few preliminary questions. In fact, Mr. Coleman did answer questions when he was ordered to do so. The record reflects the following: At one point the court indicated that it was going to require Mr. Coleman to answer questions on a question-by-question basis. The court instructed the State to ask the question first before it ordered Mr. Coleman to testify (R. 44:92-93). The questions the court ordered Mr.

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[2] When arguing unavailability at trial the State was relying on sec.908.04 (1)(a) Stats., based on Coleman's claiming the Fifth. The State submitted that "(b) applies to some extent" but its reliance was clearly on (a). (R. 44:97).

Coleman to answer were: Are you fearful of retaliation for being known as a snitch if you cooperate in this case? (R. 44:93). To which Mr. Coleman eventually replied "In part" (R. 44:94). Mr. Coleman was then asked whether he was refusing to answer any questions about his knowledge of who murdered Lewis Phillips. The court instructed him that he had to answer the question. He then answered "In part. What aren't you understanding" (R. 44:94). The court never ordered him to answer another question. Mr. Coleman was later asked "Did you know Lewis Little?" The answer was "Yes." When asked if he saw anyone strike Lewis Phillips with a bat, he invoked his Fifth Amendment rights (R. 44:94).

It is clear from the above that Mr. Coleman answered preliminary questions when he was ordered to. When he was specifically asked about the substance of what had occurred he invoked his Fifth Amendment rights, however he was not ordered to answer those questions because the court believed that it did not have the authority to delve into the witness's invocation of that right. The State now concedes that Mr. Coleman did not properly invoke the Fifth Amendment.

The State relies on State v. Buelow, 122 wis. 2d 465. That case is distinguishable. The facts in Buelow are clearly different than the facts here. In Buelow a witness refused to testify on Fifth Amendment grounds after which the State granted her immunity from prosecution. The trial court then

ordered her to testify but the witness still refused. The trial court then found the witness in contempt. Only after the contempt finding did the court find the witness to be unavailable. In our case there was no immunity granted Mr. Coleman nor was there a contempt of court finding in spite of the defense's request that he be found in contempt and ordered to appear the next day to give testimony. In Buelow it is clear that the defendant was not allowed to claim the protections of the Fifth Amendment. In this case Mr. Coleman was. Buelow clearly does not control.

Consistent with the State's observations at trial, this was a 908.04(1) (a) case not a 908.04(1)(b) case. Contrary to the State's present assertions, Mr. Coleman did not persistently refuse to answer questions regarding the substance of his prior statements in the face of repeated court orders. Given the importance of this witness to the State's case, given the nature of the case, and given the trial court's erroneous view that it could not delve into the reasons Mr. Coleman invoked the Fifth Amendment, Mr. Coleman should not have been found to have been an unavailable witness.

IV. THE TRIAL COURT SHOULD PERSONALLY VOIR DIRE A DEFENDANT IF IT IS GOING TO INSTRUCT THE JURY THAT AN INSTRUMENTALITY ALLEGEDLY USED DURING THE COMMISSION OF AN OFFENSE CONSTITUTES A DANGEROUS WEAPON.

The State asserts that it is our position that despite

the defendant's expressed agreement with the court's instruction at trial, the court should have rejected his stipulation and instructed the jury on the statutory definition of a dangerous weapon. (Page 34 - State's Brief). The State misstates our position. It is our position that the trial court should have personally voir dired the defendant prior to accepting any waiver. We are not arguing that the defendant could not have agreed to the instructions given.

The State recognizes that in various situations an extensive personal colloquy is required before a court can accept a stipulation to an element of a criminal offense. (Page 35 - State's Brief). The State however characterizes the waiver in this case as a routine stipulation of fact. The State then goes so far as to argue that Tomlinson need not have personally spoken at all to effect a valid stipulation.

The State relies heavily on State v. Benoit, 229 Wis. 2d 630, 600 N.W. 2d 193 (1999), for its proposition that an expressed personal waiver by the defendant was not required. As we argued in our brief-in-chief we believe Benoit is not on point.

Unlike in Benoit, we believe that the issue of whether the bat was a dangerous weapon was passed on by the court, and was not left to the jury. The jury was not informed of a stipulation, rather the finding of the court in that regard took the form of a jury instruction directing the jury that

the baseball bat constituted a dangerous weapon. From the facts in Benoit it seems as though the jury in that case passed on all issues and, presumably, had the power to reject the stipulation of the parties. That was not an option in this case. In this case the court specifically removed that issue from the jury, passing on it itself.

The cases cited by the State regarding evidentiary stipulations are clearly not on point. We are not talking about a stipulation to admit evidence, but rather a trial court answering a jury question.

Given the State's position we are left to wonder which elements of various offenses an can attorney stipulate to on behalf of his client without an in depth personal colloquy of the client being required. Certainly if the court proposed to instruct the jury that a defendant caused the death of a victim, thereby satisfying the first element of first degree reckless homicide, it would be expected that a personal voir dire of a defendant would be required in order to take that issue from the jury. The State's argument supposes that some elements are more significant than others, and therefore some might require a personal colloquy before the determination of that element is taken from jury, while such a colloquy is not required with respect to other elements. We are asking that the court fashion a rule that whenever a trial court takes the consideration of an element of an offense from the jury that

it can only be done after a personal voir dire of the defendant.

Dated: 2/19, 2002.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing brief is in nonproportional type with a courier font and is 13 pages long including this page.

Dated: 2/19, 2002.

Respectfully submitted,

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